115 pgs

MT LEGISLATIVE HISTORY

Chapter 507 1985

Bill (H) 363 S _____ Original bill & hist. ___C

H. Committee on Judiciary		S. Committee on Judiciary	
Hearing Date(s) Feb 12	✓C	Hearing Date(s) Mar 18	✓C
Feb 20	✓C	Mar 22	✓C
_____	___C	Mar 23	✓C
_____	___C	_____	___C
Date Out Feb 20	✓C	Mar 23	✓C

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

HOUSE BILL NO. 363

INTRODUCED BY MARKS

IN THE HOUSE

January 22, 1985	Introduced and referred to Committee on Judiciary.
February 21, 1985	Committee recommend bill do not pass as amended.
	Objection to adverse committee report.
	Bill printed and placed on members' desks.
February 23, 1985	Second reading, do pass as amended.
February 25, 1985	Correctly engrossed.
February 26, 1985	Third reading, passed.
	Transmitted to Senate.

IN THE SENATE

March 4, 1985	Introduced and referred to Committee on Judiciary.
March 25, 1985	Committee recommend bill be concurred in as amended. Report adopted.
March 26, 1985	Motion pass consideration until 67th Legislative Day.
March 28, 1985	Second reading, concurred in as amended.

March 30, 1985	Third reading, concurred in. Ayes, 42; Noes, 7.
	Returned to House with amendments.

IN THE HOUSE

March 30, 1985	Received from Senate.
April 4, 1985	Second reading, amendments concurred in.
April 5, 1985	Third reading, amendments concurred in.
	Sent to enrolling.
	Reported correctly enrolled.

HOUSE BILL NO. 363

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS; AMENDING SECTION 27-1-221, MCA; AND PROVIDING AN APPLICABILITY DATE AND AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-1-221, MCA, is amended to read:

"27-1-221. When exemplary damages allowed. (1) ~~In~~ Subject to subsection (2), in any action for a breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

(2) The jury may not award exemplary or punitive damages:

(a) unless it has awarded actual damages;

(b) if it has found the defendant guilty only of negligence; and

(c) unless the plaintiff has proved all elements of the claim for exemplary or punitive damages beyond a reasonable doubt, which is the same burden of proof that a prosecutor has in a criminal case.

(3) The plaintiff may not present, with respect to the issue of exemplary or punitive damages, any evidence to the jury regarding the defendant's financial affairs or net worth unless the judge first rules, outside the presence of the jury, that the plaintiff has presented a prima facie claim for exemplary or punitive damages.

(4) As used in this section, the following definitions apply:

(a) "Exemplary or punitive damages" means an amount up to 5% of the net worth of each defendant or three times the amount of actual damages awarded, not including attorney fees or costs, whichever is less.

(b) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant to thereby deprive a person of property or legal rights or otherwise cause injury.

(c) "Malice" means a specific intent of the defendant to cause injury to the plaintiff or to engage in conduct that the defendant knew or should have known would injure the plaintiff, unless the defendant acted in good faith.

(d) "Oppression" means cruel and unjust hardship caused by the defendant with a specific intent to do so."

NEW SECTION. Section 2. Severability. If a part of

INTRODUCED BILL
HB 363

this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 3. Applicability. This act applies to any proceeding begun after or pending on the effective date of this act that has not been submitted to a jury on the effective date of this act.

NEW SECTION. Section 4. Effective date. This act is effective on passage and approval.

-End-

(To be kept current -- post bills when entering being heard or leaving committee.) Form CS-32

STATUS SHEET

FORTY-NINTH LEGISLATIVE SESSION

COMMITTEE ON JUDICIARY

HOUSE BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CONCURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CONCURRED IN DATE
HB 276	1/19/85	2/14/85 2/15/85	2/15/85	2/15/85					
HB 286	1/19/85	1/24/85	1/24/85			1/24/85			
HB 310	1/22/85	2/4/85 2/5/85	2/5/85			2/5/85			
HB 313	1/22/85	2/11/85	(TABLED 2/11/85)						
HB 323	1/22/85	2/5/85 2/4/85	2/5/85			2/5/85			
HB 332	1/22/85	2/5/85	2/5/85			2/5/85			
HB 333	1/22/85	2/5/85	2/5/85	2/5/85					
HB 335	1/22/85	2/5/85	2/5/85			2/5/85			
HB 340	1/22/85	2/5/85	2/5/85			2/5/85			
HB 341	1/22/85	2/4/85 2/5/85	2/5/85			2/5/85			
HB 352	1/22/85	2/5/85	2/5/85	2/5/85					
HB 353	1/22/85	2/6/85	2/8/85	2/8/85					
HB 357	1/22/85	2/6/85 2/14/85	2/14/85		2/14/85 (AS AMENDED)				
HB 363	1/22/85	2/12/85 2/20/85	2/21/85		2/20/85	AS AMENDED			
HB 366	1/22/85	2/14/85 2/16/85	2/16/85		2/16/85				
HB 370	1/23/85	1/31/85	1/31/85		1/31/85				

Use a separate sheet for Senate, House Bills, and Resolutions

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

February 12, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Tuesday, February 12, 1985 at 8:00 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF HOUSE BILL NO. 363: Rep. Bob Marks, District #75 and sponsor of HB 363, offered testimony in its support. He informed the committee that HB 363 is the first of five punitive damage bills that are scheduled for hearing today. The reasons these bills were introduced is because there is more and more abuse of punitive damages by the plaintiffs in lawsuits. Rep. Marks briefly went through the contents of the bill.

Senator Chris Christiaens, District #17, appeared and offered testimony with regards to SB 200 and the other bills relating to punitive damages. A copy of his testimony was marked as Exhibit B and attached hereto.

CONSIDERATION OF HOUSE BILL NO. 400: Rep. Ed Grady, District #47, sponsor of HB 400, testified. He said HB 400 simply amends 27-1-221. It is a simple, but very important, bill. It would provide that a jury may not consider a defendant's financial worth when determining the amount of exemplary or punitive damages to be awarded.

CONSIDERATION OF HOUSE BILL NO. 511: Rep. Tom Hannah, District #86, sponsor of HB 511, appeared and offered testimony in support of this bill. He said that HB 511 simply sets a limit on punitive damages. He said that punitive damages may be awarded to a plaintiff in an amount equal to the amount of actual damages awarded to the plaintiff or $50,000 whichever is more, but not in excess of $500,000.

CONSIDERATION OF HOUSE BILL NO. 533: Rep. Fred Thomas, District #62, testified in support of his bill. He said the purpose of this bill is to set up where punitive damages will go after a party is fully compensated for actual damages. He said that the intent of this legislation is to make the system fairer by not awarding unjust punitive damages for the benefit of enriching a few people.

CONSIDERATION OF HOUSE BILL NO. 536: Rep. Jack Ramirez, District #87, sponsor of HB 536, testified in support of it.

EXHIBIT A-1
2/12/85

Prepared and submitted by Rep. John Cobb

1. All bills amend 27-1-221 punitive damage statute.

HB 363

1) Amount for damages - up to 5% net worth or 3 times actual damages - whichever is less
2) Jury must find actual damages
3) Defendant must be guilty of negligence
4) Plaintiff must prove all elements of claim for punitive or exemplary damages beyond a reasonable doubt - same burden of proof as a prosecutor must prove in criminal cases.
5) Plaintiff can not give Defendant's net worth or financial affairs to jury, unless outside presence of jury, the judge rules that Plaintiff presented a prima facie claim for exemplary or punitive damages.
6) Defines fraud, malice, oppression.

HB 400 amends 27-1-221

1) Jury may not consider a defendant's financial worth when determining the amount of exemplary or punitive damages to be awarded.
2) A plaintiff may not present evidence of a defendent's financial affairs, net worth, profits, or wealth on the issue of exemplary or punitive damages.

HB 511 amends 27-1-221

1) Punitive damages may be awarded to a plaintiff in an amount equal to the amount of actual damages awarded to the plaintiff or $50,000 whichever is more, but not in excess of $500,000.

HB 536 amends 27-1-221

1) Award punitive damages if Defendant's
   a) guilty of fraud or actual malice or
   b) violated a statute knowingly and purposely or with actual malice

S 200 amends 27-1-221

1) Jury may not award exemplary or punitive damages in excess of three times the amount of actual damages awarded or 5% of the net worth of each defendant, whichever is less

HB 533 amends 27-1-221

1) Punitive damages awarded in this order
   a) expenses of litigation
   b) attorney fees
   c) plaintiff's share - equal to amount paid to attorney fees
   d) remainder to state of Montana
2) Attorney fees regulated in actual amount
   a) fee must not be more than 33 1/3 of 1st 150,000 of punitive damages
   b) 25% next $200,000
   c) 10% over any amount over $350,000

PUNITIVE DAMAGES

History

In the English legal system damages called exemplary or punitive damages go back to the 1760's if not earlier. Since their early use, punitive awards have been a source of controversy.

Then it was difficult for juries to award damages for intangibles such as pain, impairment, embarrassment, inconvenience, and the like without the awards being challenged as excessive. Juries would instead award the plaintiff money to help overide the "smart" caused by the injury. "Smart money" was awarded not just for the intangible consequences of bodily injury but also for the indignities associated with seduction, deceit in inducing marriage, alienation of affection, and other improprieties.

Only a tiny minority of states repudiate or never embrace the punitive damages doctrine. (4 states)

The other states use four rationales have been used to justify punitive awards.

1) Compensation

A few states take the position that punitive damages are exclusively compensatory in purpose and are needed to supplement compensatory damages.

2) Punishment and Deterrence

In the majority of jurisdictions the principal purpose of punitive damages is to punish flagrant wrongdoers and to deter them and others from engaging in flagrant conduct in the future.

3) Revenge

The theory is that the punitive damages award will cool the wrath and heal the wounded sense of honor of the injured party and, hopefully, dissuade him from taking justice into his own hand.

4) Promotion of Justice

a) availability of punitive damages may make it worthwhile for plaintiffs to sue defendants who should be sued but who, in the absence of punitive damages, would not be, because of the trifling nature of the actual damages suffered by the plaintiff.

b) availability of punitive damages may also bring about proper admonishment of a wrongdoer where compensatory damages alone would not suffice.

General Characteristics of Punitive Damages

A few of the general characteristics of punitive damages are enumerated below:

1. One proposition is that punitive damages are awardable only where the plaintiff can prove actual loss. However, the apparent simplicity of this proposition is deceiving.[58] The chief inconsistency among the jurisdictions has to do with nominal damages. In some situations a plaintiff cannot show any measurable injury

to support compensatory damages but the court on general principles wishes to show its empathy with the plaintiff. Nominal damages of, say, one dollar may be awarded. The court may then want to add punitive damages. An unsettled question is whether punitive damages can be supported by nominal (or token) actual damages.[59]

2. Punitive damages must bear a reasonable ratio to actual loss suffered. The rub is that reasonableness in this context defies definition and may be interpreted quite differently from one jurisdiction to another. Whether the reasonable ratio proposition has substance is debatable. It may be vacuous. It certainly is at odds with the use of nominal damages in punitive awards.
3. The plaintiff, as the incidental recipient, generally has no right to punitive damages but rather receives them only if and as they are awarded by the jury (or by the court in the absence of a jury).[63] Here again, the rule is not firm.
4. Under the usual wrongful-death statutes, punitive damages are not appropriate where an act of the defendant resulted in wrongful death of another. Yet, in a substantial minority of states this characteristic does not apply.[65]
5. Punitive damages, being personal to the defendant, do not usually survive such defendant.[67] This rule seems to be more universal than any of the previously enumerated ones.
6. Punitive damages historically have been awarded only in tort cases. There seems to be a growing tendency, however, to allow punitive damages in actions for breach of contract.
7. When punitive damages are assessed against each of multiple defendants, the defendants usually but not necessarily are severally and not jointly liable; assignees of the injured party may or may not recover the punitive damages, depending on local rules.[69]
8. Since one purpose of punitive damages is to punish the defendant, the net worth of the defendant is usually admissible evidence in the determination of how large the award need be to truly punish the defendant.[70] In some jurisdictions the financial status of the plaintiff is also admissible evidence. Additionally, in some jurisdictions financial evidence about either is admissible only for holding down the damages but not for supporting the initial plea.
9. A principal, usually an employer, may become vicariously liable for punitive damages under the doctrine of respondeat superior for wrongful acts of an agent, usually an employee.[72] Among the jurisdictions, however, the rule admits of many qualifications, restrictions, and exceptions.[73]
10. Today most courts allow punitive damages for malicia or oppression.

Arguments Against Punitive Damages

1. Punitive Damages are not really damages at all but penalties that should be removed from the civil and confined to the criminal law.
2. Awarding of punitive damages can place a defendant in double jeopardy.
3. With no meaningful standard available for assessing punitive damages, the size of the award is limited only by the passions and prejudices of the jury and the judicial philosophy of the judges.
4. With no meaningful standard available for assessing punitive damages, the size of the award is limited only by the passions and prejudices of the jury and the judicial philosophy of the judges. As observed earlier, the reasonable ratio rule is not necessarily determinative and leaves the trier of the facts with virtually unbounded discretion as to the amount, if any, of the punitive award.[83]
5. A closely related argument against punitive damages is that the procedural safeguards provided for the defendant in the criminal law are not found in the civil law. A defendant, consequently, is extremely vulnerable in standing before the bar of justice, subject to heavy penalties but without the protection enjoyable had the charge been commission of a crime. For one thing, the "guilty beyond a reasonable doubt" rule gives way to a weaker "weight of evidence" collective judgment by the jury. For another, the amount of the punitive penalty is not fixed in the civil as in the criminal action. For still another, the jury, unlike the judge, is not trained in setting penalties. Moreover, among other differences, the defendant is not protected from self-incrimination in a civil action.[84]
6. Another objection is that in multiple-defendant suits a punitive award proper for one defendant is highly likely to be improper for another. While a jury theoretically can guage the financial status of each defendant and assess an award sufficient to punish but not overwhelm any defendant, juries are not wont to act with such finesse. The awards are almost certain to hurt some defendants unduly if they hurt others enough. As a result, the punishment-deterrent goal may not be achieved.[85]
7. A further argument against punitive damages is that the admissibility of evidence about financial infomration about the defendant is squarely at odds with evidence rules in regard to compensatory damages. The aim of compensatory damages is to restore the wounded plaintiff insofar as money will do so. Whether the defendant is rich or poor is not germane to the size of the plaintiff's hurt. The ability of the defendant to pay, then, has traditionally not had any legitimate place in the evidence accepted by the trier of the facts. With the punitive award supposed to be determined by giving consideration to the defendant's ability to pay, an apparently irresolvable conflict of rules of evidence arises. The two conflicting rules cannot be honored simultaneously in the same trial.

8. Punitive damages are further criticized when awarded vicariously against innocent employers whose employees have engaged in tortious conduct.[86] Opponents of the doctrine find it especially repugnant in its punishing further an employer who is already liable for actual damages caused by an employee and whose own personal culpability is either totally absent or minimal. These opponents feel that this rule is wrong. They feel, moreover, that even when a rule requiring "complicity of the employer" is used the courts are much too ready to find employer complicity[87] when no complicity really exists.[88]
9. Punitive damages are also condemned as constituting a windfall or unjust enrichment of the plaintiff.
10. The argument most strongly voiced is that punitive damages are no longer needed. Critics argue that punitive awards are now strictly redundant and that they represent a great idea "whose time has passed." The doctrine is said to be a legal relic. Some might even say it is a legal derelict. The argument runs that, while punitive awards might once have had a function, the compensatory damages concept was broadened long ago to include total compensation, making punitive damages purely superfluous.
11. Should not punitive damages go to society as opposed to a windfall to a very few.

Todays Problems

1. "Excessive Awards"
   a) unlimited recoveries
      - should they be or not
   b) The issue is
      Should there be some limit upon the enormity of the sanction selected by 12 people.

Solutions

1) Put limits on awards
2) Leave as is
3) Define in more detail when punitive damages should be awarded
4) Allow judges to decide awards after juries find defendant "guilty"
5. Give a portion of award to the state

Exhibit B
2/12/85

SB 200 - LIMITATION OF PUNITIVE DAMAGES

WHAT ARE PUNITIVE DAMAGES?

Punitive damages are those awarded to a plaintiff to punish the defendant. The plaintiff receives this money in addition to his actual damages. Actual damages include such economic losses as lost wages, past and future medical expenses, and loss of earning capacity. It also includes non-economical and intangible items such as loss of established way of life, which would include such things as the inability to hunt, ski or play tennis--or any loss of the "enjoyment" of life which a plaintiff partook prior to injury. It also includes loss of consortium, emotional distress, and any pain or suffering caused by the injury.

Actual damages are intended to fully compensate an injured person for both his economic and non-economic losses. Punitive damages are essentially a windfall to the plaintiff.

The common-law origins of punitive damages are found in 18th Century England. Theories differ as to the initial rationale for awarding those damages. One theory is the courts used the concept of punitive damages to justify excessive jury verdicts. Another theory used to justify punitive damages was that it would compensate plaintiffs for mental anguish, humiliation or hurt feelings. These non-pecuniary type of injuries were not recoverable under English common law. Punitive damages, therefore, compensated victims for elements of personal harm that otherwise were not recoverable.

Neither of these historical rationales justifies retention of punitive damages today. American courts have well-established standards to measure actual damages in contracts, property and personal injury cases and the courts regularly review jury awards.

Why then do we have punitive damages? The basic contemporary objective of punitive damages is to assist the judicial system in enforcing established norms of conduct by punishing the defendant for violating those norms and thereby deterring others from similar behavior. Punitive damages also serve as a public and tangible expression of society's disapproval of certain particularly outrageous conduct, and provide enhanced incentives for private civil enforcement of legal norms.

For example, in the case of Funk v. Kerbaugh, 222 Pa. 18, 19, 70 A. 953, 954 (1908), the defendant decided it would be "cheaper to pay damages" for carrying out blasting that destroyed the plaintiff's building than to alter his blasting methods. The possibility of punitive damages removes the financial temptation to engage in this sort of deliberately wrongful conduct.

In addition, there are numerous examples of criminal behavior that may not adequately be deterred by the criminal justice system alone. The county attorney may decide not to prosecute a drunk driver. Punitive damages for a plaintiff injured by drunken driving enhances society's capacity to deter such behavior by supplementing criminal prosecution with civil punishment.

In brief, punitive damages for certain types of behavior fills gaps in the criminal law.

WHY SHOULD THE PRESENT PUNITIVE DAMAGES STATUTE BE CHANGED?

In short, punitive damages have been stretched far beyond the limits of their validity. The historical justification for such damages has disappeared. Seizing upon the retributive and the current function served by punitive damages, the courts have expanded the shapeless doctrine of punitive damages into allowing astronomical awards and essentially arbitrary amounts bearing no relation to the actual harm suffered.

There is no question that the law in Montana is adequate to provide full compensation for injuries based upon appropriate measures of a person's damages in contract, property and personal injury cases. Punitive damages are neither intended nor needed to assure adequate compensation to plaintiffs.

Moreover, recent punitive damages awards go far beyond any reasonable measure of what is necessary to assure appropriate punishment and deterrence. In addition, it must be recognized that the need to impose additional damages for the purpose of deterrence and punishment must be weighed against equally important public policy considerations of fairness and economic impact.

Many business activities which were common and lawful only ten or twenty years ago now are considered to be tortious and subject to punitive damages. Imposing devastating

punitive damages upon an individual or business for malice, oppression and the like has not been clearly demonstrated is a fundamentally unjust form of punishment; it is an unfair and arbitrary windfall to certain individuals beyond that which is necessary for full compensation. It is unnecessary to achieve the valid contemporary objective for punitive damages, i.e. punishment and deterrence.

The standards for determining the amount of punitive damages to be assessed against a defendant are vague. The amount is generally left to the sole discretion of the jury, guided only by certain ill-defined factors relating to the nature of the defendant's misconduct and the wealth of the defendant. The lack of standards in the rationale for assessing punitive damages prompted the United States Supreme Court to comment on the arbitrary and prejudicial nature of punitive damages awards. Justice Powell stated in Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1973):

> In most jurisdictions jury discretion and the amount [of punitive damages] awarded is limited only by the general rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

The Supreme Court of Montana has also recognized this uncertainty in the area of punitive damages. In First Bank (N.A.)--Billings v. TransAmerica Insurance Company, 679 P.2d 1217 (1984), the Court noted that, "juries and judges typically award punitives for a broad range of conduct not often described as willful or wanton, but merely reckless or unjustifiable." Id. at 1222. The Supreme Court further

stated that, "Fact-finders. . . wrestle with concepts like recklessness and reasonableness, such that defendants may not know that their conduct constituted presumed malice until after trial, and that a defendant in one case may never know of the sting of punitive damages, while another defendant in a similar case may be faced with financing a sizeable award."

In addition, punitive damages exemplify characteristics which are inherently criminal. Since you cannot put a business in jail, punitive damages punish certain conduct and ideally deter the defendant and others from engaging in similar acts. Unlike criminal actions, however, punitive damages provide none of the constitutional protections accorded to criminal defendants. These would include a unanimous jury verdict, proving that a defendant acted with fraud, oppression or malice beyond a reasonable doubt, protection against double jeopardy and the privilege against self-incrimination.

Most important, however, is the fact that every person and every employer in the State of Montana--whether they be a hospital, a local chapter of the Salvation Army, or a farmer or a rancher--is subject to punitive damages. In many instances, the business or individual cannot obtain insurance to protect himself against a punitive damage award. In many instances, there may not be insurance available to purchase for certain wrongs. For example, in many cases where an employee sues his employer for wrongfully discharging

him, the employer's general liability policy may not afford coverage to the defendant. The employer, therefore, may have to retain his own attorney and pay any judgment rendered against him. This would apply to a farmer who hired temporary help during the summer months; it would apply to a local YMCA or Boy Scout troop whose insurance policy expressly excludes punitive damages.

Recent punitive damage awards in Montana have reached astronomical proportions. They are inconsistent with contemporary justifications for imposing such damages. They conflict with other important public interests. The punitive damages law does not help the little man; it may cripple him financially for life. Punitive damages may not be a dischargeable debt in bankruptcy if the defendant's conduct was malicious or fraudulent.

WHY SHOULD A "CAP" OF THREE TIMES THE AMOUNT OF ACTUAL DAMAGES OR FIVE PERCENT OF THE NET WORTH OF EACH DEFENDANT, WHICHEVER IS LESS, BE INCLUDED IN THE NEW LAW?

While the doctrine of punitive damages has a proper place in Montana law, there is an evident and increasing danger that many defendants are being punished unjustly.

Trial judges currently have responsibility for seeing that punitive damages are applied in principled manner, but this task is far from easy to carry out given the nearly total absence of legislative guidance. In criminal proceedings, by contrast, judges are guided by both minimum and maximum penalties established by the legislature. While the

jury determines criminal liability, the judge holds a special hearing, at which time additional information is received in order to carefully determine the appropriate punishment or penalty.

In civil trials, at which punitive damages are sought, however, neither the judge nor the jury is provided with any similar guidance. Consequently, grossly inconsistent and excessive punitive damages have occurred all too frequently.

The "cap" in the proposed legislation would represent an effort by the legislature to provide some guidance for courts in balancing society's interest in using punitive damages for deterrence and punishment against equally fundamental public interests in basic fairness and economic cost. This form of legislative guidance is common. Both federal and state laws currently place ceilings on damages in particular cases.

With respect to federal law, the following limitations apply:

1) 15 U.S.C. §1640 (Truth and Lending Act). The creditor who fails to disclose required information and who fails to meet certain mitigating criteria, is subject to damages of twice the amount of the finance charge in connection with the transaction, but not in excess of $1,000.00, nor less than $100.00;

2) 15 U.S.C. §1691e (Equal Credit Opportunity Act) provides that a creditor who fails to comply with any requirement from the ECOA is liable for punitive damages not

greater than $10,000.00, or in the case of a class action, not to exceed the lesser of $500,000.00 or one percent of the creditor's net worth;

3) 15 U.S.C. §1693m (Electronic Fund Transfers Act) states that a person failing to comply with EFTA is subject to minimum actual damages of $100.00, but not more than $1,000.00;

4) 15 U.S.C. §1989 (Odometer Act) provides a person who, with intent to defraud, violates odometer requirements is subject to the greater of $1,500.00 in punitive damages, or treble damages;

5) 15 U.S.C. §1692k (Debt Collection Practices Act) provides a debt collector who violates ACPA is subject to individual action to liability for up to $1,000.00 over injured parties' actual damages; in class actions, the maximum amount of the lesser of $500,000.00 or one percent of the net worth of the debt collector;

6) 15 U.S.C. §15(a) (Clayton Anti-Trust Act) provides that a private anti-trust plaintiff's recovery is limited to threefold the damages by him sustained;

7) 15 U.S.C. §2051 (Consumer Products Safety Act) provides that civil penalties are limited to $500,000.00 per defective product.

With respect to damages set by the Montana legislature, the examples are numerous:

1) Bad Checks - §27-1-717. "Damages shall be equal to the greater of $100.00 or three times the amount for which the check, draft or order was issued. Damages may not exceed the value of the check, draft or order by more than $500.00."

2) Breach of Agreement to Convey Real Property - §27-1-314. "The detriment caused by the breach of an agreement to convey an estate in real property is considered to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon. If the breach was in bad faith and the agreed price was less than the value of the estate, the detriment is also considered to include the difference between the agreed price and the value of the estate at the time of the breach and the expenses properly incurred in preparing to enter upon the land."

3) Breach of Contract - §27-1-311. "For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary cause of things would be likely to result therefrom. Damages which are not clearly ascertainable in both their nature and origin cannot be recovered for a breach of contract."

4) Motor Vehicle Damage - §27-1-306. "The measure of damages in a case in which the cost of repairing a motor vehicle exceeds its value shall be the actual replacement

value of the motor vehicle rather than its 'book value'. Actual replacement value is the actual cash value of the motor vehicle immediately prior to the damage."

5) Appeal Without Merit - §25-33-304. Damages not exceeding 25% of the judgment appealed from.

6) Sale on Execution - §25-13-702. "An officer selling without the notice prescribed by §25-13-701 forfeits $500.00 to the aggrieved party in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or satisfaction of the judgment (if the judgment be satisfied before sale), forfeits $500.00."

7) Insurance Companies--Fraternal Benefit Societies--Misrepresentation - §33-7-518. "Any person who violates any provision of this section . . . shall in addition be liable for civil penalty in the amount of three times the sum received by such violator as compensation or commission, which penalty may be sued for and recovered by any person or society aggrieved for his or its own use and benefit in accordance with the provisions of civil practice."

8) Penalty for Deceit - §37-61-406. Attorney forfeits to the party injured by his deceit or collusion treble damages.

9) Penalty for Delay - §37-61-407. Attorney forfeits to the party injured treble damages.

10) Contribution or Expenditure Violations - §13-37-128. Person liable for an amount up to $500.00 or three times the amount of the unlawful contributions or expenditures, whichever is greater.

11) Motor Carriers--Procedure to Recover Excess Charges - §69-12-511. In Subsection 2 it states that if upon the trial of such action it satisfactorily appears to the court or to the jury that such an overcharge was willfully made, the person or shipper bringing the action shall be awarded damages in treble the amount of such excess or overcharge.

12) Railroads--Actions to Recover Excess Charges - §69-14-322. In subsection 1 it states that if the charge was willfully made, the person or shipper bringing the action shall be awarded damages in treble the amount of such excess or overcharge, together with the costs and expenses of the action, including reasonable attorney's fees.

13) Railroads--Maintenance of Fireguards - §69-14-722. In subsection 3 it states that if any railroad company fails to comply with any of the provisions of this section, the Board of County Commissioners of the county wherein such violation incurs may cause the neglected plowing, burning, or both to be done and may, in a suit to be brought in their name as said board and the district court having jurisdiction, recover double the amount of cost of such plowing, burning or both, with reasonable attorney fees to be fixed by the court. Such railroad company shall be liable further for all damages caused by its failure to comply with this section.

14) Regulation of Carriers--Confiscation of Fuel - §69-11-108. "Any person, railroad company, or common carrier who shall confiscate or take any coal or fuel,

either for his or its own use or for the use of another, shall be liable to the consignee or owner of such coal or fuel in double the value of such coal or fuel at the point of shipment and such other damages as may be caused by the confiscation of such coal. Such liability shall be exclusive of and in addition to any and all charges for the transportation of such coal or fuel, which charges for the transportation shall be paid by the party confiscating such coal or fuel."

"(3) Any person, corporation, or common carrier who shall violate the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $50.00 or more than $200.00.

15) Liability for False Claims - §17-8-231. "A person who knowingly presents or causes to be presented a false, fictitious or fraudulent claim for allowance or payment to any state agency or its contractors forfeits the claim, including any portion that may be legitimate, and in addition, is subject to a penalty of not to exceed $2,000.00 plus double the damages sustained by the state as a result of the false claim, including all legal costs."

16) Unfair Trade Practices--Injunctions - §30-14-222. In subsection 2 it states that in addition to such injunctive relief in violation of §30-14-205 through §30-14-218, the plaintiff is entitled to recover from the defendant three times the amount of actual damages sustained.

17) Injunctions--Damages--Production of Evidence (Consumer Protection) - §30-14-222. "(2) In addition to such injunctive relief, the plaintiff is entitled to recover from the defendant three times the amount of actual damages sustained."

18) Liability of Clerk Relating to Duties as Recorder - §7-4-2623. "A county clerk is liable to the party aggrieved for three times the amount of the damages which may be occasioned thereby. . ."

19) Offices and Employees--Itemized receipt for Fees - §7-4-2517. "[I]f he refuses or neglects to do so when required, he is liable to the party paying the same in treble the amount so paid."

20) Offices and Employees--Prohibition Upon Receiving Other Fees - §7-4-2519. "[T]he party demanding or receiving any fees not herein allowed is liable to refund the same to the party aggrieved, with treble the amount as damages, in addition to the cost of suit."

21) Elected Energy Producers License Tax--Penalty for Violation - §15-51-113. Persons shall be liable for three times the amount of the unpaid or delinquent tax in a civil action.

22) Trust and Fiduciary Relationships--Action for Misappropriation of Estate Prior to Appointment - §72-12-601 "If any person, before the granting of letters, testementary or of administration, commits theft of or alienates any of the monies, goods, chattels, or effects of a decedent, he

is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so mishandled to be recovered for the benefit of the estate."

23) Finder Failing to Make Discovery - §70-5-209. "If any person find any money, property or other valuable thing and fail to make discovery of the same as required by this chapter, he forfeits to the owner double the value thereof."

24) Forceable Entry and Detainer - §70-27-205. "[T]he judgment shall be rendered against the defendant, guilty of the forceable entry or forceable or unlawful detainer, for three times the amount of the damages thus assessed and of the rent found due."

25) Forceable Entry and Detainer - §70-27-206. "If a person recovers damages for a forceable or unlawful entry in or upon or detention of any building or cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

26) Rights and Obligations--Action for Waste - §70-16-106. "If a guardian, tenant for life or years, joint tenant, or tenant in common of real property commits waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages."

27) Rights and Obligations--Injury to Timber - §70-16-108. "For wrongful injuries to timber, trees, or underwood upon the land of another or removal thereof, the measure of damage

is three times such a sum as would compensate for the actual detriment . . ."

28) Containment of Livestock--Trespassing Animals in Herd Districts - §81-4-307. In subsection 5 it states that if the person is guilty of a misdemeanor he shall also be liable to the party entitled to such damages and charges in double the value of the stock.

29) Residential Landlord and Tenant Act--Unlawful Ouster - §70-24-411. "[T]he tenant may recover possession or terminate the rental agreement and, in either case, recover an amount not more than three months periodic rent or ~~treble~~ treble damages, whichever is greater."

30) Failure of Landlord to Deliver Possession - §70-24-405. "(2) If a person's failure to deliver possession is purposeful and not in good faith, and aggrieved party may recover from that person an amount not more than three months periodic rent or treble damages, whichever is greater."

31) Residential Landlord and Tenant Act--Holdover Remedies - §70-24-429. "[I]f the tenant's holdover is purposeful and not in good faith, the landlord may recover an amount not more than three months' periodic rent or treble damages, whichever is greater."

32) Residential Landlord and Tenant Act--Disposition of Personal Property Abandoned by Tenant - §70-24-430. In subsection 5 it states that if the landlord purposefully damages tenant's personal property, the landlord is liable for double damages.

33) Residential Landlord and Tenant Act--Prohibited Provision in Rental Agreement - §70-24-403. If a party purposefully uses a rental agreement containing a prohibited provision, the other party may recover in addition to his actual damages an amount up to three months' periodic rent.

34) Residential Landlord and Tenant Act--Noncompliance of Tenant - §70-24-422. In Section 4 it states that the landlord may recover actual damages and obtain injunctive relief for any noncompliance by the tenant with the rental agreement or §70-24-321. If the tenant's noncompliance is purposeful, the landlord may recover treble damages.

35) Residential Tenant Security Deposit--Wrongful Withholding of Security Deposit - §70-25-204. Subsection 1 states that any person who wrongfully withholds a residential property security deposit or any portion shall be liable in damages to the tenant in the civil action for the amount equal to double the sum determined to have been wrongfully withheld or deducted.

36) Sales and Distribution of Motor Vehicles--For Injury to Business or Property - §61-4-406. Any person who is injured in his business or property by any other person or corporation or association or partnership by reason of anything forbidden or declared to be unlawful by this part may sue and recover twofold the damages by him sustained and the cost of the suit.

37) Sales and Distribution of Motor Vehicles--Penalties - §61-4-210. In subsection 3 it states that if any new motor

vehicle dealer incurs pecuniary loss due to a violation of this part by a manufacturer, distributor, importer, or factory branch or representative or agent thereof, the dealer may recover damages therefor in a court of competent jurisdiction in amount equal to three times the loss, together with costs including reasonable attorney's fees.

38) Sales and Distribution of Motor Vehicles--Civil Damages - §61-4-137. Any dealer who suffers pecuniary loss due to a violation of §61-4-131 through §61-4-137 is entitled to damages equal to three times the loss, together with court costs and reasonable attorney's fees.

39) Parent and Child--Destruction of Property by Minors - §40-6-237. Any aggrieved party is entitled to recovery damages in a civil action in an amount not to exceed $2,500.00 from the parents of any person under the age of 18 years who shall maliciously or willfully destroy property.

CONCLUSION

The legislature should restrain the doctrine of punitive damages ill-advised and economically devastating effects. The law is continuously changing. In the case of punitive damages, the legislature should insure the fair and responsible administration of justice by establishing reasonable damages by which appropriate conduct can be punished or deterred.

EXHIBIT C
Punitive Damage Bill
February 12, 1985

Testimony Before the
House Judiciary Committee

Mr. Chairman, members of the Judiciary Committee, my name is Tuck Vosburg, President of Pacific Hide & Fur Depot from Great Falls, Montana. I am testifying on behalf of our company, its employees and shareholders.

Pacific is a Montana Corporation doing business here since about 1919. We are involved in hides, fur, metals recycling and the sale of steel and farm products through a system of local branches. Our company employs 400 people with nearly all of our stock held by Montana residents.

My purpose is to provide you with a brief view of what happens within a company when it is sued for a large punitive damage claim. Our company went to trial on two cases last year where large punitive damages were threatened.

Usually rumors of a suit circulate then become fact when the complaint is served on one of us in the office. We immediately turn over the complaint to our insurance company for defense and coverage. Within days we receive a letter from the insurance company accepting limited coverage but stating, I quote from their letter, [redacted] In Montana this denial of coverage is a common occurance.

Next, discovery begins with attorneys' fees clicking off and management time mounting. During discovery employees begin to hear about pieces of the suit. The possibility that the company will lose significant dollars begins to circulate around the company. Employees wonder about the effect on the company and the subsequent effect on their own jobs. Will the company have to cutback to pay the punitive damage awards? Will these cutbacks include jobs?

With all these pressures building, settlement becomes a stronger alternative even though the company feels it did no wrong and will win the suit. Remember, with no punitive damage coverage, the insurance company is not willing to participate to any great extent in settlement amounts.

Then we go to trial. Attorneys' fees range from $50,000 to $100,000, usually closer to the latter because the possibility of large punitive damages extends the case far beyond the scope the issues demand. One of our trials took four weeks to complete. Management time becomes totally committed to success at trial. Employees' concerns mount and productivity falls as they or fellow employees are called to testify. Publicity generates more talk for employees to contend with.

If we win there is some rejoicing and a great sense of relief. If we lose, punitive damage awards could require the company to convert assets to cash to pay the award. Cash is rarely available in these sums. Nor would the company's bank credit line be available for this purpose. That means lowering inventories and accounts receivable or selling equipment, buildings, and land. The next step for the company would be to contract because its assets have been reduced. That contraction results in cutting out jobs.

And why would this happen? Because the punitive damage legislation in this state has no direct relationship to the actual damages a jury determines. Large punitive damage awards against a company affect the people in that company and their jobs. People who had nothing to do with the issue in the first place.

You may ask, "Why does our company or any business, individual, or farmer feel so threatened when large punitive damages are asked for in a suit, especially if we feel we are innocent?" The answer, the risk of loss, often in the millions of dollars, and the unpredictability of juries. We dare not take a suit lightly. Remember, the standards in effect today require only that 51% of the evidence, a preponderance of the evidence, be against us for a jury to award punitive damages. If 51% is found, the jury has no guidelines to assess punitive damages other than the exaggerated amount stated by the plaintiff's attorney. Even if the standards for punitive damages were raised, a suit for such huge sums would still demand our total involvement. We must commit all of our resources to successfully defending ourselves no mater how minor the actual damages claimed might be. This kind of involvement means we are not out earning the profits necessary to be a viable business for Montana.

Something is wrong with the present punitive damage criteria. I ask you to put some justice into the punitive damage legislation.

EXHIBIT D
Punitive Damage Bills
2/12/85

HB 363, 400, 511, 533 and 536--Punitive Damages

My name is Greg Holt. I live and work in Great Falls. I own a 5,000 acre wheat farm near the Oilmont area. The farm has been in my family for 30 years. I employ three full-time persons and three part-time workers. A foreman runs the crew on a daily basis.

I support limiting punitive damages and changing the law with respect to when they can be awarded. Although neither I nor my business has been sued, there is always that possibility; lawyers seem to be filing lawsuits left and right these days.

I cannot purchase insurance for punitive damages according to my insurance agent. If my foreman or I discharge an employee and we are sued, my insurance agent advises me that my policy will not cover me, nor can I buy one that will cover this risk. Since that is the case, I am at risk at losing my personal assets, including my farm.

It makes good sense to me to set a reasonable limit on the amount of punitive damages that can be awarded. If I do something wrong and get sued, my conduct might warrant punishment. But shouldn't there be a limit? There are limits in criminal sentences.

I also believe that if I am to be punished, the same standards ought to apply to me as apply to a defendant in a criminal case. After all, don't we punish criminals to make them an example to others and hopefully to deter similar conduct?

In a criminal case, all twelve jurors must find the defendant guilty. If I am sued for punitive damages, only eight jurors must find me guilty. This makes no sense.

In a criminal case, the jury must find that the defendant committed the crime "beyond a reasonable doubt". If I am sued for punitive damages, the jury must find that the "greater weight of evidence" is against me. This is an easier standard of proof than in the criminal case. Again, this makes no sense.

In a nutshell, we give people accused of a crime more protection than we do people sued for punitive damages.

I respectfully request you put some common sense into this law.

Thank you.

EXHIBIT E
Punitive Damage Bill
2/12/85

COP CONSTRUCTION CO.
General Contractors
AN EQUAL OPPORTUNITY EMPLOYER
P.O. BOX 20913
PHONE 406 252-8421
BILLINGS, MONTANA 59104

February 11, 1985

House Judiciary Committee
Montana House of Representatives
Helena, Montana 59601

Dear Representative Hannah and Members
of the House Judiciary Committee:

Enclosed are letters of testimony concerning the crisis problem of punitive damages in civil actions in the State of Montana. The risks and liabilities attached to conducting the least and most simple civil agreement are paralyzing. The problem is at crisis proportions.

Corrective action is needed and needed immediately. I request that you vote for the series of House bills on the topic of punitive damages. Bills to be considered are HB 95, 363, 400, 511, 533, and 536.

Very truly yours,
COP CONSTRUCTION COMPANY

John L. Hansen
President

JLH/ks

Encl.

EXHIBIT
2/12/85
Punitive Damages

Submitted by
John Hoyt, ESQ.

PUNITIVE DAMAGES

LAWYER MORE THAN 35 YEARS AND A RANCHER.

SEVENTEEN FAMILIES RELY ON ME.

THE LANGUAGE OF OUR PUNITIVE DAMAGE STATUTE UNDER SUCH VIGOROUS ATTACK HERE PERMITS A JURY TO AWARD THESE DAMAGES ~~FOR~~ against A PERSON GUILTY OF OPPRESSION, FRAUD, OR MALICE, ACTUAL OR PRESUMED.

OPPRESSION: The bill never eliminate oppression.

NEARLY TOPPLED THE GOVERNMENT OF ENGLAND AND LED TO MAGNA CARTA IN 1215 A.D. BECAUSE THOSE WITH ABSOLUTE OR TOO MUCH POWER TOO OFTEN USED IT TO OPPRESS.

THUS, FROM THIS HISTORIC EVENT OVER 750 YEARS AGO, SPAWNED BY OPPRESSION, SPRANG THE BODY OF ENGLISH COMMON LAW WHICH HAS SERVED ALL ENGLISH-SPEAKING COUNTRIES SO WELL EVER SINCE.

PUNITIVE DAMAGES HAVE ALWAYS BEEN AN ESSENTIAL PART OF COMMON LAW. FORGED UNDER CONCEPT THAT TRUE EQUALITY MEANS A DETERRENT TO CONDUCT BASED ON OPPRESSION AND MALICE, BY WHATEVER NAME, WHICH CONDUCT IS TOTALLY UNACCEPTABLE TO OUR DEMOCRATIC AND SOCIAL CONCEPTS.

THE NEXT STEP IN THE EVOLUTION OF OUR SOCIETY WAS THE COLONIZATION OF AMERICA BY ENGLISH MEN AND WOMEN WHO BROUGHT TO OUR SHORES THE COMMON LAW WHICH STILL GOVERNS US WITH THE SHIELD OF PUNITIVE DAMAGES AS A GUARD AGAINST OPPRESSION.

BUT AGAIN OPPRESSION REARED ITS UGLY HEAD, AND OUR FOREFATHERS FOUGHT A CRUEL WAS SO THAT WE COULD BE FREE OF ENGLISH OPPRESSION.

THEY THEN ENACTED OUR CONSTITUTION WITH FURTHER GUARANTEES, ADOPTED OUR COMMON LAW WITH PUNITIVE DAMAGES AS A BASIC TENET THEREOF.

PUNITIVE DAMAGES HAVE TWO MAJOR BASIC BENEFITS FOR ALL:

1. PROVIDES EACH INDIVIDUAL A TOOL OR SHIELD AGAINST THOSE WHO WOULD ATTEMPT THE FORBIDDEN CONDUCT.
2. WE GIVE UP NOTHING FOR THAT LEGAL PROTECTION. WE DO IT OURSELVES. IT IS SELF-EXECUTING. NO FUNDING REQUIRED. TRUEST DEMOCRACY.

DON'T NEED A COUNTY ATTORNEY, ATTORNEY GENERAL. YOU DON'T HAVE TO ASK ANYONE FOR PROTECTION. WE CAN PROTECT OURSELVES.

THIS IS A MOST UNIQUE FEATURE OF OUR DEMOCRACTIC SOCIETY AND THE COMMON LAW. INDIVIDUALS HAVE RETAINED FOR THEMSELVES THE POWER AND THE RIGHT TO DETER THOSE WHO WOULD UTILIZE AN ADVANTAGE BASED ON THEIR OWN WEALTH, POWER, OR GREED.

<u>ONE OF THE BILLS WOULD MAKE THE STATE THE BENEFICIARY OF A PUNITIVE DAMAGE AWARD</u>. PUNITIVES ARE ALREADY SUBJECT TO FEDERAL AND STATE INCOME TAX. NO LAWYER CAN SERVE TWO MASTERS.

<u>ANOTHER WOULD REGULATE ATTORNEY'S FEES</u>. THESE WOULD ELIMINATE THE SELF-EXECUTING FEATURE OF OUR PUNITIVE DAMAGE SYSTEM WHICH HAS BEEN TESTED, TRIED, AND APPROVED FOR HUNDREDS OF YEARS.

When punitives are sought compensatory damages go down.

THE INSURANCE INDUSTRY KNOWS THAT THE PERSON WHO HAS A LEGITIMATE CLAIM WOULD BE AT THE MERCY OF ITS PROFESSIONAL STAFF AND SKILLED DEFENSE ATTORNEYS IF THAT PERSON WERE UNABLE TO OBTAIN A CAPABLE LAWYER HIMSELF. THIS IS EVEN MORE TRUE IF THE CONDUCT RISES TO THE LEVEL WHERE PUNITIVE DAMAGES COULD BE AWARDED. I F YOU REGULATE THE LAWYERS - THEN YOU COULD THROW OUT ALL OF THE OTHER BILLS.

LIMITING PUNITIVE DAMAGES: + Key mental of the Defendant must

THE CONCERN FOR THE POTENTIALLY LARGE PUNITIVE DAMAGE AWARD IS THE REAL DETERRENT TO THE TYPE OF CONDUCT WE ALL OPPOSE AND WHICH PUNITIVES PREVENT, DIMINISH, OR DETER.

IF A LIMIT IS IMPOSED, THE FEAR OF BEING CAUGHT IS GONE.

THE MAXIMUM EXPOSURE BY THE PROPOSED BILLS WOULD THEN SIMPLY BECOME A COST OF DOING BUSINESS --

A. IT WOULD DETER NO WRONGFUL CONDUCT;

B. SAVE NO LIVES;

C. PREVENT NO INJUSTICE, AND

D. SIMPLY INCREASE THE COST OF OUR GOODS AND COMMODITIES.

In many states, the wealth of Each Board is essential - farmers.

WHO IS COMPLAINING ABOUT OUR PUNITIVE DAMAGE SYSTEM WHICH HAS WORKED SO WELL THESE HUNDREDS OF YEARS?

- IS IT JOHN DOE OR MARY DOE ON THE STREET?
- OUR WORKERS?
- OUR RURAL CITIZENS?
- OUR UNDERPRIVILEGED?
- OUR FRIENDS AND NEIGHBORS?
- OUR MIDDLE-CLASS CITIZENS? [Gibson Case] Rice in N.D.

RAMIERZ' PARTNER TESTIFIED VS. THE INSURANCE COMPANY.

Bad faith statute - no penalty

THEN WHO IS COMPLAINING? WHO IS SEEKING THESE CHANGES?
Emotional – Unnecessary concern

A. NO ONE OR ENTITY AGAINST WHOM A PUNITIVE DAMAGE AWARD HAS BEEN ASSESSED HAS COME FORTH AND TOLD YOU THE TREATMENT WAS UNFAIR OR THE VERDICT WAS WRONG.

So it

B. THOSE WHO CONDUCT THEIR BUSINESS WITH ORDINARY PRUDENCE, CARE AND CONCERN FOR OTHERS? -- NO.
I AM NOT CONCERNED ABOUT PUNITIVES. Insurance available

C. THE COMPLAINTS OBVIOUSLY HAVE EMINATED FROM THOSE WHO REFUSE TO COME FORTH AND BE IDENTIFIED.

D. FROM THOSE WHO CANNOT JUSTIFY DENYING THE PROTECTION OF OUR COMMON LAW PUNITIVE DAMAGE SYSTEM TO OUR CITIZENS.

E. THOSE WHO TESTIFIED FOR SENATE BILL 200 WERE PERSONS AGAINST WHOM PUNITIVE DAMAGES WERE SOUGHT. THEY SAY THEY DID NOT CONDUCT THEMSELVES IN AN ONEROUS MANNER, AND THE JURY AGREED. THUS, THEY RECEIVED THE PROTECTION BUILT INTO OUR JURY SYSTEM, AND THEY HAD NOTHING TO FEAR - ABSOLUTELY NOTHING.

F. THOSE WHO SEEK THE PASSAGE OF THESE BILLS (NOT THE LEGISLATORS WHO SPEAK FOR THEM) ARE THOSE WHO SEEK AN ADVANTAGE. THOSE WHO WOULD NOT CONDUCT THEIR BUSINESS WITH ORDINARY CARE AND CONCERN FOR OTHERS. THOSE WHO WOULD UTILIZE THEIR WEALTH AND POWER WITHOUT RESTRAINT. THOSE WHO WOULD TAKE ADVANTAGE OF INJUSTICE, OPPRESSION, TREACHERY OR MALICE.

WHO ARE THE VICTIMS? -- ANY MONTANA CITIZEN COULD BE. EVEN YOU AND ME.

NO BUSINESS HAS REFUSED TO COME INTO THIS STATE BECAUSE WE HAVE OUR SYSTEM OF PUNITIVE DAMAGES. LESS THAN A HALF A DOZEN DON'T.

INSURANCE IS NOT A PROBLEM. INSURANCE COMPANIES COULDN'T OPERATE IF THEY DIDN'T COVER PUNITIVE DAMAGES AS THEY DO IN ALL THE OTHER STATES.

WASHINGTON RATES.

EXPLAIN CHECKS AND BALANCES IN OUR PUNITIVE DAMAGE SYSTEM.

EXPLAIN OUR JURY SYSTEM:

- CONSERVATIVE
- THOUGHTFUL
- INTELLIGENT
- INFORMED
- CROSS-SECTION OF THE COMMUNITY
- CONSCIENCE OF THE COMMUNITY
- NOT INFLUENCED BY ANY POSSIBLE GAIN, MONEY, POWER, OR EVEN A VOTE.

BOTH SIDES PRESENT TESTIMONY AND ARGUMENTS EQUALLY.
EACH CASE DECIDED ON ITS OWN MERITS.

NOTHING YET AS GOOD AS OUR JURY SYSTEM.

EACH PROPONENT IS PROTECTED BY IT.

THE REQUIREMENTS TO BE A JUROR IN MONTANA IS THAT THEY ARE REGISTERED VOTERS. WOULD YOU TRUST THEM TO ELECT YOU AND THEN SAY WE DON'T TRUST THEM TO DISPENSE JUSTICE, TO UNDERSTAND OPPRESSION, FRAUD OR MALICE, ACTUAL OR IMPLIED?

ARE WE SAYING THAT THE JURORS IN MONTANA CANNOT DISPENSE JUSTICE AS THEY HAVE DONE SINCE THE FIRST JURY VERDICT IN THIS STATE IN THIS COUNTRY, AND AS JURORS HAVE DONE FOR HUNDREDS OF YEARS?

REDEFINE MALICE.

ONE BILL WOULD ELIMINATE IMPLIED OR PRESUMED MALICE, AND WOULD YOU BELIEVE THAT ANOTHER ONE WOULD EVEN ELIMINATE OPPRESSION AS A CRITERIA FOR THE ASSESSMENT OF PUNITIVE DAMAGES AND LIMIT THEM TO PROOF OF ACTUAL MALICE?

A TYPICAL JURY INSTRUCTION IS:

"IF YOU FIND THE DEFENDANT'S CONDUCT WAS WILLFUL AND WANTON..."

ANOTHER IS:

"IF YOU FIND THE DEFENDANT ACTED WITH UTTER DISREGARD ~~AND CONCERN~~ FOR THE RIGHTS, LIFE OR WELL BEING OF PLAINTIFF ..."

AREN'T THESE INSTRUCTIONS EASY TO UNDERSTAND AND COMPREHEND?

DON'T YOU THINK THE PEOPLE WHO ELECTED YOU UNDERSTAND THEM THOROUGHLY AND COMPLETELY?

ISN'T THIS THE TYPE OF CONDUCT THAT YOU AND EACH OF YOU PERSONALLY CONDEMN?

THESE INSTRUCTIONS DEFINE OPPRESSION OR IMPLIED OR PRESUMED MALICE.

ACTUAL MALICE IS IMPOSSIBLE TO PROVE. NO ONE WILL ADMIT TO IT.

NO ONE HAS OR WILL TELL YOU OF ONE SINGLE PUNITIVE DAMAGE AWARD WHICH HAS BEEN UPHELD IN MONTANA THAT WAS UNREASONABLE.

NO ONE WILL COME BEFORE YOU AND TELL YOU THAT THE CONDUCT PUNITIVE DAMAGES DETER SHOULD BE PERMITTED.

NO ONE WILL COME BEFORE YOU AND SAY THAT THE PUNITIVE DAMAGE STATUTE IN ITS PRESENT FORM DOES NOT CONCERN THOSE WHO WANT A LICENSE TO DO WRONG.

Insurance bad faith - no penalty except punitive

BEYOND REASONABLE DOUBT

THEN THERE IS A BILL TO SOMEHOW CHANGE THE BURDEN OF PROOF FOR THE ASSESSMENT OF PUNITIVE DAMAGES.

LET'S HAVE A MINI TRIAL RIGHT NOW.

YOU ARE THE JURY. THE PROPONENTS ARE THE PLAINTIFFS, AND THE OPPONENTS THE DEFENDANTS.

THE PROPONENTS SAY THE STANDARD SHOULD BE CHANGED TO "BEYOND A REASONABLE DOUBT." YET THEY, THEMSELVES, COME UP WITH NO EVIDENCE. NO PROOF. ONLY FLIMSY INNUENDOS TO SUPPORT THEIR POSITION. SHOULD THEY NOT OFFER THE SAME STANDARD HERE THEY SEEK TO IMPOSE ON OUR CITIZENS. IS ANYONE HERE CONVINCED OF THE MERIT OF ANY OF THESE BILLS "BEYOND A REASONABLE DOUBT"?

~~Proponents~~ Prove the opposite
willful wrongful conduct

... THE COMMISSIONER FINDS SUCH A COMPANY HAS VIOLATED AN ORDER, HE MAY THEN TELL IT TO DESIST FROM SUCH ACT OR PRACTICES.

WHAT HAPPENS TO THE COMPLAINANT? NOTHING. NO REMEDY. SO WHY PURSUE NOTHING.

THE PENALTY? FOR A PERSON WHO VIOLATES A CEASE AND DESIST ORDER (AFTER A HEARING) HE IS SUBJECT TO A PENALTY NOT TO EXCEED $1,000. EACH DAY OF VIOLATION CONSTITUTES A SEPARATE VIOLATION. THE TOTAL PENALTY MAY NOT EXCEED $10,000 AGGREGATE.

IN CHECKING WITH THE AUDITOR'S OFFICE, WE FIND ONE HEARING AGAINST I T T LIFE INSURANCE COMPANY WHICH FOUND IN FAVOR OF THE COMPANY ON A COMPLAINT CONCERNING A SALES PITCH.

A RIGHT WITHOUT A REMEDY IS NO RIGHT AT ALL. IS IT CONSTITUTIONAL?

THIS CHAPTER AND SECTION 33-18-1005, HOWEVER, SPECIFICALLY PROVIDE THAT THE CEASE AND DESIST IS NOT THE ONLY METHOD OF ENFORCING THE UNFAIR SETTLEMENT PRACTICES AND RESERVES TO THE ABUSED ALL OTHER APPROPRIATE REMEDIES.

HERE, YOU ARE ASKED TO MAKE APPROPRIATE REMEDIES INAPPROPRIATE AND LEAVE OUR CITIZENS DEFENSELESS AND HELPLESS WHILE AT THE SAME TIME MANDATING AND REQUIRING THAT THEY CARRY INSURANCE.

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT [33-18-201]

THIS ACT ENACTED IN 1977 HAS FOLLOWED A TREND ACROSS THE COUNTRY AND LISTS 14 DIFFERENT TYPES OF PROHIBITED CONDUCT BY INSURANCE COMPANIES. A FEW ARE:

[4] REFUSE TO PAY CLAIMS WITHOUT CONDUCTING A REASONABLE INVESTIGATION BASED UPON ALL AVAILABLE INFORMATION.

[6] NEGLGECT TO ATTEMPT IN GOOD FAITH TO EFFECTUATE PROMPT, FAIR AND EQUITABLE SETTLEMENTS OF CLAIMS IN WHICH LIABILITY HAS BECOME REASONABLY CLEAR.

[7] COMPEL INSURED TO INSTITUTE LITIGATION TO RECOVER AMOUNTS DUE UNDER AN INSURANCE POLICY BY OFFERING SUBSTANTIALLY LESS THAN THE AMOUNTS ULTIMATELY RECOVERED IN ACTIONS BROUGHT BY SUCH INSUREDS.

NOW A PERSON WHO HAS BEEN VICTIMIZED BY AN INSURANCE COMPANY VIOLATING THESE SECTIONS CAN BRING AN APPROPRIATE ACTION AND ASK FOR PUNITIVE DAMAGES. THIS IS THE ONLY WAY IN WHICH THOSE INSURANCE COMPANIES WHO WOULD NOT DEAL WITH OUR CITIZENS IN GOOD FAITH ARE, IN A SENSE, COMPELLED TO DO SO - OR FACE AN ACTION INCLUDING A CLAIM FOR PUNITIVE DAMAGES.

THE UNFAIR CLAIMS SETTLEMENT PRACTICES ACT HAS A SECTION CALLED "ENFORCEMENT", BEING 33-18-1001 through 1005.

THIS IS WHAT THE COMPANIES LOVE. IT PROVIDES THAT IF THE COMMISSIONER BELIEVES A PERSON ENGAGED IN INSURANCE VIOLATES ANY ACT OR PRACTICE IN THE CONDUCT OF SUCH BUSINESS, IT MAY HOLD A HEARING UPON A WRITTEN COMPLAINT. [IN HELENA, OF COURSE.]

THERE IS NO WAY THEY COULD PREVAIL BEFORE A JUDGE OR BEFORE A JURY. THEY SHOULD NOT PREVAIL BEFORE YOU.

IF THEY CAN'T EVEN CARRY THE BURDDEN OF PREFPONDERANCE BEFORE A COURT OR A JURY, THEY WOULD BE THROWN OUT. A VERDICT WOULD BE DIRECTED AGAINST THEM BY THE COURT. NO JURY WOULD LISTEN TO NO PROOF, AND THAT IS WHAT SHOULD HAPPEN TO EACH OF THESE BILLS HERE. THEY SHOULD BE THROWN OUT WITHOUT FURTHER ADO.

FINALLY, NOTHING HAS BEEN SAID ABOUT THE VICTIMS OF THE WRONGFUL CONDUCT, THE OPPRESSION, THE MALICE OR THE FRAUD THAT WOULD BE IMPOSED UPON OUR CITIZENS WITH THE ENACTMENT OF ANY OF THESE BILLS. I ASK THAT YOU SPEAK FOR THESE PEOPLE, THESE CITIZENS, THESE REGISTERED VOTERS, AND THEIR CHILDREN AND YOURS.

No bills in my lifetime, of which I am aware, promote less good & more evil than these

unreasonable disregard of or in indifference to that risk.

(4) The plaintiff may not present, with respect to the issue of exemplary or punitive damages, any evidence to the jury regarding the defendant's financial affairs or net worth unless the judge first rules, outside the presence of the jury, that the plaintiff has presented a prima facie claim for exemplary or punitive damages.

(5) A defendant is guilty of oppression if he intentionaly causes cruel and unjust hardship by:

(A) Misuse or abuse of authority or power; or

(B) Taking advantage of some weakness, disability, or misfortune of another person.

(6) (a) In cases of actual fraud, or actual malice, the jury may award reasonable punitive damages after considering the circumstances of the case.

(b) In all other cases where punitive damages are awarded punitive damages may be in an amount up to but no greater than $100,000 or 1% of the defendant's net worth whichever is greater.

(7) If a plaintiff sought exemplary damages at trial, but such damages were not awarded, the court shall submit to the jury a question concerning whether the jury found in the evidence presented any reasonable basis in fact for seeking exemplary damages. If the response to the question is negative, the court may, in its discretion as a penalty against

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 03/18/85
BILL NO. HB 363

EXHIBIT G
February 12, 1985
Punitive Damage bills

EXEMPLARY (PUNITIVE) DAMAGES MONTANA SUPREME COURT - 1965 TO DATE

CASE	DEFENDANT ENTITY	AMOUNT OF COMPENSATORY AWARD BY JURY	AMOUNT OF EXEMPLARY DAMAGE ASSESSED BY JURY	AMOUNT OF EXEMPLARY DAMAGE ASSESSED BY SUPREME COURT
Crenshaw v. Bozeman Deaconess Hospital, Edwin E. Dalhberg (1984)	Hospital	$125,000	$25,000	Affirmed - $25,000
Castillo v. Franks (1984)	Individual (rancher)		$5,000	Affirmed - $5,000
Gehnert v. Cullinan (1984)	Individuals (2)	$614.32	$10,000 for each of 4 Defendants	Affirmed total of $40,000 remanded other grounds
Gibson v. Western Fire Insurance Co. (1984)	Western Fire Ins. Co.	$250,000	$300,000	Affirmed - $300,000
Eliason v. Wallace (1984)	Individual	$4,346.52 total combined	$500	Affirmed - $500
Doll v. Major Muffler and Colonial Leasing Co. of New England, Inc., a Massachusetts Corp., d/b/a Colonial-Pacific Leasing Co. (1984)	Muffler Co. Leasing Co.	$30,000 $10,000	$90,000 $40,000	Affirmed - $90,000 Vacated - other awar
Purcell and Gary v. Automatic Gas Distributors, Inc. (1983)	Gas Distributors	$13,198	$50,000 each Plaintiff	Affirmed - $100,000
Kuiper v. The Goodyear Tire & Rubber Co., et al. (1984)	Tire Co.	$325,000	$1,500,000	Remanded $0 New Trial
Derenburger v. Lutey (1983)	Industrial	$100,000	$10,000	Reversed $0
Gates v. Life of MT Insurance Co. (1983)	Insurance Company	$1,891	$50,000	Reinstated $50,000 from N.O.V.
Lemley v. Allen (1983)	Industrial/ Business	$0	$500	Reversed $0

CASE	DEFENDANT ENTITY	AMOUNT OF COMPENSATORY AWARD BY JURY	AMOUNT OF EXEMPLARY DAMAGE ASSESSED BY JURY	AMOUNT OF EXEMPLARY DAMAGE ASSESSED BY SUPREME COURT
Harris v. American General Life Ins. Company of Delaware (1983)	Insurance		$30,000	Affirmed - $30,000
Lipinski v. The Title Insurance Company and Flathead County Title Company (1983)	Insurance	$25,000	$15,000	Remanded $0
Johnson v. Murray (1982)	Individual	$100,000	$100,000 (by default)	Affirmed - $100,000
Miller v. Watkins (1982)	Public Stable Owners	(no jury) $1,500 (Plf.) $78,000 (Def.)	$50,000 (Def.)	Affirmed $50,000
Bolz v. Myers (1982)	Individual	$25,802.50	$5,000	Affirmed $5,000
Allers v. Willis (1982)	Individual	$128,000	$15,000	Affirmed $15,000
Weber v. Blue Cross Of MT (1982)	Health Care Provider	$157,137	$999,999	Reversed & Remanded (-0-)
Darvial v. T&W Chevrolet (1982)	Car Dealer	$2,678	$750	Affirmed $750
Dvorak v. Hutley Project Irrigation District, Propp & Maynard (1981)	Irrigation District	$5,000	$40,000 (punitive damages struck in post-trial Order)	Reversed & Remanded New Trial
Shahrokhfar v. State Farm Mutual Auto Ins. Co. (1981)	Insurance Company	$850	$80,000	Affirmed $80,000
Dahl v. Petroleum Geophysical Co. (1981)	Oil Well Drilling Company	$14,850	$8,500	Affirmed $8,500
Lauman v. Lee (1981)	Individual	- 0 -	$17,500	Affirmed $17,500
Flemmer v. Ming (1980)	Individual & Corporations	$13,127 estimated	$20,000 app.	Affirmed est. $20,00
Magnuson v. Billmater (1980)	Individual	$1,644	$11,500 (to Ronald Magnuson)	Affirmed $11,500

CASE	DEFENDANT ENTITY	AMOUNT OF COMPENSATORY AWARD BY JURY	AMOUNT OF EXEMPLARY DAMAGE ASSESSED BY JURY	AMOUNT OF EXEMPLARY DAMAGE ASSESSED BY SUPREME COURT
Toeckes v. Baker (1980)	Individual	$230	$1,000	Affirmed $1,000
First Security Bank of Bozeman v. Goddard v. Bankers Union Life Ins. Co. (1979)	Life Insurance Co.	$4,227.95	$5,000	Affirmed $5,000
Butcher v. Petranek (1979)	Individual	$925	$20,000	Affirmed $20,000
Bermes v. Sylling (1978)	Individual	$130,463.62	$5,000	Affirmed $5,000
Miller v. Fox (1977)	Individual	No value specified	$400	Affirmed $400
Purington v. Sound West (1977)	Music Co.	$4,350	$1,500	Remanded ($0)
Johnson, et al. v. Doran, et al. (1975)	Real Estate Broker	$16,772	$43,500	Affirmed $43,500
Holland v. Briggs, et al. (1975)	Individuals	$600	$7,000	Vacated & Remanded ($0)
Sheehan v. Dewitt (1969)	Individual	$1,000	$5,000	Affirmed $5,000
Hurley v. Northern Pacific Railway Co. (1969)	Railroad	$6,640	$3,000	Affirmed $3,000
McCusker v. Roberts, Gallatin Lumber Co., Western General Enterprises & Chauner (1969)	Builder, Lumber Co. and its manager	$2,500	$7,500	Affirmed $7,500
Gagnier v. The Curran Construction Co. (1968)	Construction Co. & Individual	$10,661	$25,000	Reversed $0
Dutton, et al. v. Rocky Mountain Phosphates (1968)	Phosphate Plant	$113,283.80	$10,000	Affirmed $10,000

CASE	DEFENDANT ENTITY	AMOUNT OF COMPENSATORY AWARD BY JURY	AMOUNT OF EXEMPLARY DAMAGE ASSESSED BY JURY	AMOUNT OF EXEMP DAMAGE ASSESSE BY SUPREME COUR
Security State Bank of Harlem v. Kittleson (1967)	Bank	$144	$5,000	Affirmed $5,000
Ryan v. Ald, Inc. (1965)	Corporation	$3,415	$7,500	Reversed & Remanded $0
		TOTAL ASSESSMENTS FOR TWENTY YEARS		$1,054,150

LG83

ACTION ON HOUSE BILL NO. 533: Rep. Keyser moved that HB 533 DO PASS. The motion was seconded by Rep. O'Hara and discussed.

It was Rep. Keyser's opinion that HB 533 is a good approach to be taken.

Rep. Mercer moved to amend the title of the bill by striking on line 5 the words "A PORTION OF AWARDS" and inserting "ONE-FOURTH OF EACH AWARD". Also on page 2, line 3, following "defendant." strike "One-fourth of the damage award must". The motion was seconded by Rep. Brown, and it carried unanimously.

Rep. O'Hara further moved that HB 533 DO PASS AS AMENDED. The motion was seconded by Rep. Keyser. The question was called, and the motion failed. Without objection the vote was reversed and HB 533 left the committee on a DO NOT PASS AS AMENDED recommendation. (See roll call vote.)

ACTION ON HOUSE BILL NO. 536: Rep. Keyser moved that HB 536 DO PASS. The motion was seconded by Rep. O'Hara.

Rep. O'Hara feels the language needs to be tightened up. He doesn't see why a higher standard can't be placed on awards.

Rep. Addy stated that the law says that implied malice is outrageous. That is the policy question remaining.

Rep. Hannah stated that he is troubled with this whole issue. This bill is not attempting to define any conduct that is prohibited. He feels that the standard is awfully light, and that this applies to a pretty broad band of people.

The question was called and the do pass motion failed 7-11. (See roll call vote.) Without objection, the vote was reversed, and the bill left the committee with a DO NOT PASS recommendation.

ACTION ON HOUSE BILL NO. 363: Rep. Brown moved that HB 363 DO NOT PASS. The motion was seconded by Rep. Hammond and discussed.

Rep. Mercer moved to amend HB 363 starting on line 19 of page 1 by striking ":" and by further striking lines 20, 21, 22 and the "(c)" on line 23. Furthermore, on page 2, strike all the material beginning on line 8 through line 24. Rep. Mercer feels this amendment would get us down to the reasonable doubt question. Also, this provides that financial affairs could not be disclosed until the judge determines who is involved in the case. The motion was seconded by Rep. Brown and the motion carried with Rep. Keyser dissenting.

Rep. Brown moved that HB 363 DO PASS AS AMENDED. The motion was seconded by Rep. Addy.

Rep. Addy suggested that the material on line 25, "which is the same burden of proof that a prosecutor has in a criminal case" be deleted because it doesn't add to the clarity or concept. He further commented by saying there is a burden of proof between preponderance and beyond a reasonable doubt and that is clear and convincing evidence. He feels the bill would be in better shape, before dragging it out to the floor of the House, if "clear and convincing evidence" were adopted as the standard rather than beyond a reasonable doubt.

Rep. Mercer moved to amend the newly adopted amendment by changing on line 23 following "proved" by inserting "by clear and convincing evidence". Also, on line 25, following "doubt" insert ", too" and delete "which is the same burden of proof that a prosecutor has in a criminal case". The motion having been seconded, the motion to amend carried unanimously.

Rep. Keyser moved that HB 363 DO PASS AS AMENDED. The motion was seconded by Rep. O'Hara.

Rep. Brown made a substitute motion for a DO NOT PASS AS AMENDED. The motion was seconded by Rep. Krueger.

The question was called on the DO NOT PASS AS AMENDED motion, and it carried 10-8. (See roll call vote.)

ADJOURN: A motion having been made and seconded, the executive session adjourned at 9:15 p.m.

Tom Hannah

TOM HANNAH, Chairman

2-21-85

STANDING COMMITTEE REPORT

February 20 19 85

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 363

FIRST reading copy (WHITE color)

LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS

Respectfully report as follows: That HOUSE Bill No. 363

be amended as follows:

1. Page 1, line 19.
Following: "damages"
Strike: ":" through "(2)" on line 23.

2. Page 1, line 24.
Following: "damages"
Strike: "beyond" through "case" on page 2, line 1.
Insert: "by clear and convincing evidence"

3. Page 2, following line 7.
Strike: Subsection (4) in its entirety.

AND AS AMENDED,
DO NOT PASS
~~DO PASS~~

REP. TOM MANNING Chairman.

COMMITTEE SECRETARY

STATE PUB. CO.
Helena, Mont.

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE February 20, 1985 BILL NO. HB 363 TIME 9:15 p.m.

NAME	AYE	NAY
Kelly Addy	✓	
Toni Bergene	✓	
John Cobb		✓
Paula Darko	✓	
Ralph Eudaily		✓
Budd Gould		✓
Edward Grady		✓
Joe Hammond	✓	
Kerry Keyser		✓
Kurt Krueger	✓	
John Mercer		✓
Joan Miles	✓	
John Montayne	✓	
Jesse O'Hara		✓
Bing Poff	✓	
Paul Rapp-Svrcek	✓	
Dave Brown (Vice Chairman)	✓	
Tom Hannah (Chairman)		✓

Marcene Lynn
Secretary

Tom Hannah
Chairman

Motion: Rep. Brown made a substitute motion that HB 363 DO NOT PASS AS AMENDED. The motion was seconded by Rep. Krueger and carried 10-8.

CHAIRMAN--MAZUREK, JOE
SECRETARY-STALEY, CINDY
NORMAL SCHEDULE==> SITE: OLD SUPREME COURT ROOM DAYS: M-TU-W-TH-F TIME: 10:00 A.M.-12 NOON

--BILL NO---	REFER DATE---	HEARING DATE---	CONSIDERATION DATES----------	COMMITTEE ACTION----------	REREFERRED TO COMM----	DATE OUT-
HB0310	2/11	3/11	3/19 3/20	CONCUR AS AMENDED		3/21
WALDRON, STEVE			ABUSED HOUSEHOLD MEMBERS TO OBTAIN SELF-HELP TEMPORARY RESTRAINING ORDER			
HB0323	2/11	3/12		CONCUR AS AMENDED		3/12
MOORE, JACK K.			CIVIL PENALTY FOR SHOPLIFTING			
HB0329	3/04	3/07		CONCUR AS AMENDED	JUDICIARY	3/7
HANNAH, TOM			REVISION OF MECHANICS' LIEN LAW RELATING TO SUPPLIERS AND SUBCONTRACTORS			
HB0329	3/07	3/26	3/26	TABLED		3/28
HANNAH, TOM			REVISION OF MECHANICS' LIEN LAW RELATING TO SUPPLIERS AND SUBCONTRACTORS			
HB0335	2/12	3/05		CONCUR AS AMENDED		3/5
BRADLEY, DOROTHY			ALLOW A COURT TO ORDER FORFEITED BAIL TO BE PAID AS RESTITUTION TO A VICTIM			
HB0340	2/12	3/13	3/20	CONCUR AS AMENDED		3/21
RAMIREZ, JACK			AMENDS LAWS ON DISPOSITION OF PROPERTY ABANDONED BY A TENANT AFTER VACATING			
HB0341	2/21	3/12		CONCUR AS AMENDED		3/21
MILLER, RON			CIVIL LIABILITY OF PERSON WHO STOPS PAYMENT ON CHECK, DRAFT, OR ORDER			
HB0352	2/11	3/12	3/12	CONCUR		3/12
NELSON, RICHARD M.			GIVING DIST. CRTS. JURISDICTION WITH JUSTICES' CRTS IN CERTAIN MISDEMEANORS			
HB0353	2/13	3/15	3/28	TABLED		3/15
NELSON, RICHARD M.			AGGRAVATED BURGLARY IF ENTER OCCUPIED STRUCTURE TO COMMIT AN OFFENSE			
HB0354	2/22	3/22		CONCUR AS AMENDED		3/23
BRANDEWIE, RAY			ABOLISHING STATE LICENSING OF AIRPORTS AND AIR NAVIGATION FACILITIES			
HB0363	3/04	3/18	3/22	CONCUR AS AMENDED		3/23
MARKS, ROBERT L. (BOB)			LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS			

The hearing on HB 778 is closed.

CONSIDERATION OF HB 363: Representative Robert Marks is the sponsor of this bill. There are really four parts to HB 363 as it would limit punitive damages. First, the plaintiff would have to prove the element for punitive damage by clear and convincing evidence. The plaintiff may not present the position that the defendant may have, that is his financial statement or his net worth, unless the judge rules outside the hearing of the jury, that the plaintiff has proved a prima facia claim for punitive damages. The third component is that the defendant is guilty of oppression if he intentionally causes cruel and unjust hardship by misuse or abuse of authority or power, or taking advantage of some weakness, disability or misfortune of another person, which is the Supreme Court language. The fourth part of this bill that is distinctive is that punitive damages may not be awarded to a plaintiff in the amount in excess of $500,000. That's basically the bill. I would ask that you would amend the bill, however, and I have given those amendments to the secretary and I think she has distributed them along with a narrative (Exhibit 11). Representative Marks then went through the amendments with the committee. The amendments are underlined in the narrative.

PROPONENTS: Sam Ryan, Helena, Supervisory Committee Chairman, Tri-Valley Credit Union, East Helena, supports this bill. We had an employee discharged for good cause and he was awarded an undeserved cash settlement. Thank you.

Jim Jones, Attorney from Billings, supports this bill. Mr. Jones supports putting a "cap" on punitive damages because he believes they are being abused by the legal profession. Mr. Jones said that people who believe they have done nothing wrong and that they have acted in good faith cannot afford to go to court because there is no limit or standards that are meaningful, and there is no limit on the amount of recoverable damages. Mr. Jones went over many areas that were covered by Representative Marks. Mr. Jones recommended that the committee use the language "beyond a reasonable doubt," and he felt that this was not a Constitutional question, and that the legislature had full power to do this. Mr. Jones agreed with the amendments. Mr. Jones said he had some problem with presumed malice and felt it had to be defined. He said no bank or financial institution could foreclose on any mortgage or collect any debt without violating that standard. He said you know it is going to hurt that other person, and when you do so intentionally, you violate this standard. Mr. Jones thinks it should be taken out completely.

Mike Rice, President Transystems, Inc., of Great Falls, supports this bill because of the risk of a loss. He feels they have had

to pay out large amounts to avoid going to court. He feels like the prize in a lottery. He said that most of the claims are not against big, fat cats, but are against the little companies. He said that they are finding that nearly every single claim they have is accompanied by punitives. He said that they now have a bigger problem, they cannot find an insurance company and he feels that Montana has been "red-lined," at least for high risk businesses such as themselves, a trucking company. He said that because of this problem they have expanded so that 80% of their employees are now from outside of Montana, and they are going to continue to hire from outside Montana. He said when you have a high risk business in Montana and you are expanding, you dump it and move into lower risk areas and this is just what they have done. He agreed with many of the points made by Mr. Jones, including adding beyond a reasonable doubt and defining clear and convincing evidence, and getting rid of the implied malice thing.

John Hanson, President Copp Construction, supports this bill. Mr. Hanson entered written testimony attached hereto marked Exhibit 13. They are moving their company to Wyoming.

Francis J. Raucci, Vice-President and General Counsel of Buttreys, supports this bill. Mr. Raucci entered written testimony attached hereto marked Exhibit 14.

Bob Reiquam, First Banks in Great Falls, supports this bill. Mr. Reiquam entered written testimony attached hereto marked Exhibit 15.

Forrest Boles, President of Montana Chamber of Commerce, supports this bill. He said the Billings Chamber of Commerce is also in favor of this bill.

Randy Johnson, Executive Vice-President of Montana Grain Growers Association, and they support this bill.

Keith Anderson, Montana Taxpayers Association, supports this bill. Mr. Anderson entered written testimony attached hereto marked Exhibit 16.

Roger McGlynn, Executive Director of Independent Insurance Agents of Montana, representing many small insurance agencies around Montana and they all support this bill.

Irv Dellinger, Montana Building Material Dealers Association, supports this bill, as amended.

Jeff Kirkland, representing the Montana Credit Unions League, and they strongly recommend passage of this bill as amended.

Dave Piper, President of the Continental Bank in Harlowton, supports this bill. He is a victim of a punitive damage suit.

Elmer Hauskin, Lobbyist representing Montana Association of Underwriters, and they strongly support passage of this bill, as amended.

Roger Young, President, Great Falls area Chamber of Commerce, supports this bill.

Mike Young, representing the State Department of Administration, said and for once I do not represent the state of Montana, but the little guy who is personally liable for these things.

OPPONENTS: Terry Trieweiler, Montana Trial Lawyers Association, opposes this bill. He said that after listening to all the proponents he has not heard anyone say that Montana juries have returned too many punitive damage awards. Mr. Trieweiler said the figures that they have previously had indicate to the contrary. Over the past five years, the Montana Supreme Court has had occasion to consider five appeals on an annual basis involving punitive damages and that represents 1-2% of all the cases the Montana Supreme Court considers. Neither has anyone given you one example of a punitive damage verdict returned by a jury in the state of Montana where the result offended anyone. I submit that if you knew all the facts in the cases where punitive damages were awarded, you would be as equally offended by the defendant's conduct as the jury was. Mr. Trieweiler said that the solution to the problem is not to throw the baby out with the bathwater if there is a problem. He said that if people are presenting cases that are without foundation, the solution is to deal with the problem. He submits the attached documents (Exhibit 17) saying that these rules are already on the books and are there for people who have claims against them which are without merit. He said putting a "cap" on punitive damages doesn't protect anyone. Mr. Trieweiler then went on to explain the attached rules. He suggests the solution is more vigorous and more ready enforcement of the rules that are already available. Mr. Jones said Rule 11 hasn't been enforced in 15 years, well let's just amend it to include those sanctions in October of 1985. Mr. Trieweiler entered a simple statement of purpose to accompany SB 200, which he stated that this committee and the Senate had enacted, which he claimed increased the burden on those people seeking punitive damages. He then read the statement to the committee.

Reverend Bob Holmes, Pastor of the United Methodist Church, opposes this bill. Rev. Holmes entered written testimony attached hereto marked Exhibit 18.

Pat Tribby opposes this bill. Ms. Tribby entered written testimony attached hereto marked Exhibit 19.

John Hoyt, a lawyer from Great Falls, opposes this bill. He sees one problem with the "cap". To take a percentage of net profit creates a mind-boggling swamp in the courtroom. What happens to Mutual Insurance Companies? This is an issue that has arisen. Mutual Insurance Companies say they have no net worth, so the net worth figure, of course, would be monstrosity. Amendment #5 that the juries not be advised of the law, seems to be an insult to the people of this state. We have judges to advise the people of the law. We do not want them to work in a vacuum. Mr. Hoyt felt this would allow very oppressive, scurilous conduct. He feels we should work with the laws we already have.

Bruce Whearty, Elliston, opposes this bill. Mr. Whearty entered written testimony and a letter attached hereto marked Exhibit 20.

Karl Englund, Montana Trial Lawyers Association, opposes this bill. Mr. Englund entered written testimony attached hereto marked Exhibit 21.

James D. Moore opposes this bill. Mr. Moore did not testify, but he entered written testimony attached hereto marked Exhibit 22.

QUESTIONS OF THE COMMITTEE: Senator Mazurek asked that the proponents and opponents be available during executive action because there is still one more bill to hear.

CLOSING STATEMENT: Representative Marks said HB 363 is not Representative Ramirez's bill, it is his bill. Secondly, I don't have anything against lawyers, you notice I did not bring this up in my testimony. Representative Marks said he is concerned about the little guy and that's why the cap, because he thinks this will protect the little businesses. Representative Marks said that it had been stated that there weren't very many cases with punitive damages. He said that in Lewis and Clark County in the last quarter of 1984, there were 138 cases filed requesting money, and 22 of them had punitive damages. Some of them specified amounts from $2500-$1 million. In Yellowstone County for the two months of this year, the research indicated there had been 54 damage cases filed and there were 18 punitive damage claims in that. Representative Marks said the little guy cannot ignore a punitive damage suit. You have to try to get the thing taken care of, and that hurts. Representative Marks asked that this bill be passed with the amendments.

The hearing on HB 363 is closed.

CONSIDERATION OF HB 95: Representative Jack Ramirez is the sponsor of this bill. This bill is written to correct a situation which

PROPOSED AMENDMENT TO HB-363:

Page 2, line 2.
Following: "EVIDENCE."
Insert: "(3) Presumed malice exists when a person has knowledge of facts, intentionally avoids learning of facts, or recklessly disregards facts, which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or in indifference to that risk. Presumed malice as herein defined may be proven by direct or circumstantial evidence.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 032385
BILL NO. HB 363

STANDING COMMITTEE REPORT

MARCH 18 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 363

Third reading copy (Blue color)

LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS

Respectfully report as follows: That HOUSE Bill No. 363

Third reading copy
Be amended, as follows:

1. Page 2, line 2.
Following: "EVIDENCE."
Insert: "Clear and convincing evidence means evidence which is unmistakable and free from serious or substantial doubt.

(3) Presumed malice exists when a person has knowledge, which knowledge may be proven by direct or circumstantial evidence, of facts which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or in indifference to that risk."

2. Page 2, line 3.
Strike: "(3)"
Insert: "(4)"

~~DO PASS~~

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 031885
BILL NO. HB 363

Chairman.

STATE PUB. CO.
Helena, Mont.

JOURNAL

March 18, 1985 19

3. Page 2, line 9
Strike: "(4)"
Insert: "(5)"

4. Page 2, line 14
Strike: Lines 14 and 15 in their entirety.
Insert: "(6) (a) In cases of actual fraud, or actual malice, the jury may award reasonable punitive damages after considering the circumstances of the case.

(b) In all other cases where punitive damages are awarded punitive damages may be in an amount up to but no greater than $100,000 or 1% of the defendant's net worth whichever is greater.

(7) If a plaintiff sought exemplary damages at trial, but such damages were not awarded, the court shall submit to the jury a question concerning whether the jury found in the evidence presented any reasonable basis in fact for seeking exemplary damages. If the response to the question is negative, the court may, in its discretion as a penalty against such party, the party's attorney, or both, assess damages in an amount not to exceed what is determined by the court to be reasonable attorney fees and costs of the defendant incurred in defense of such claims.

(8) In cases where punitive damages may be awarded, the jury shall not be instructed, informed or advised in any manner as to the limitations on the amount of exemplary or punitive damages as set forth in section 6b."

And as concurred in
DO PASS

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 031885
BILL NO. HB 363

Chairman.

STATE PUB. CO.
Helena, Mont.

HOUSE BILL NO. 363

INTRODUCED BY MARKS

A BILL FOR AN ACT ENTITLED: "An ACT LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS; AMENDING SECTION 27-1-221, MCA; AND PROVIDING AN APPLICABILITY DATE AND AN IMMEDIATE EFFECTIVE DATE.:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-1-221, MCA, is amended to read:

"27-1-221. When exemplary damages allowed. (1) Subject to subsection (2), in any action for a breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

(2) The jury may not award exemplary or punitive damages unless the plaintiff has proved all elements of the claim for exemplary or punitive damages by clear and convincing evidence. Clear and convincing evidence means evidence which is unmistakable and free from serious or substantial doubt.

(3) Presumed malice exists when a person has knowledge, which knowledge may be proven by direct or circumstantial evidence, of facts which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 031885
BILL NO. HB 363

such party, the party's attorney or both assess damages in an amount not to exceed what is determined by the court to be reasonable attorney fees and costs of the defendant incurred in defense of such claims.

(8) In cases where punitive damages may be awarded, the jury shall not be instructed, informed or advised in any manner as to the limitations on the amount of exemplary or punitive damages as set forth in section 6b.

NEW SECTION. Section 2. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid application.

NEW SECTION. Section 3. Applicability. This act applies to any proceeding begun after or pending on the effective date of this act that has not been submitted to a jury on the effective date of this act.

NEW SECTION. Section 4. Effective date. This act is effective on passage and approval.

-End-

7263R

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 031885
BILL NO. HB 363

HB363

I am John Hansen, President of COP Construction Co. of Billings, Montana. I am a life-long Montanan. COP Construction Co. has done business in this state since 1949. During that time the firm has never defaulted a contract, has never been sued, nor has it brought legal action against anyone with whom it has done business.

Last month COP Construction agreed to a pre-trial settlement of a punitive damages suit. The settlement cost $68,000.00 plus legal costs of $13,017.00 and in-house costs of $17,760.00 for a total cost of $98,777.00. The sole reason for our decision to accept a pre-trial settlement is the injustice and unfairness, and the totally helpless and hopeless position of a defendant charged under the Montana Punitive Damages Act. Right now a defendant accused, fairly or unfairly, in a civil action in Montana is infinitely at the risk of unlimited punitive damages above actual damages.

As a contractor I understand risk. The decision taken in February changed the risk from infinite to defined. The pressure of infinite risk is not justice. It is not fairness. It should not be the force that decides to abandon trial; however, under the present circumstances, it is the leading reason.

Briefly, a construction depression occurred in Montana in 1981-1982. In 1980 COP Construction did $16,000,000.00 volume. That volume declined in 1981 to $11,000,000.00 and in 1982 to $7,000,000.00. We experienced a substantial loss in 1981 and at the third quarter of 1982 our certified public accountants predicted another large loss. Their strong advice was to reduce costs.

Because of this drastic decline and bleak outlook, assets and equipment were sold and the work force was reduced. The sale of assets and reduction of work force was taken to avoid bankruptcy. No employees were laid off for poor performance or cause; there simply was not work available.

One employee, and only one, brought suit in March 1983 alleging age discrimination and wrongful discharge based on violation of the implied covenant of good faith and fair dealing.

The charge of age discrimination was heard before a Montana Human Rights Commission examiner. Before the hearing could be completed, the employee and his attorney got up and walked out of the room; therefore, that charge was not resolved.

Business volume recovered in 1983 to $11,000,000.00. A firm offer of re-employment was made to the employee. He refused to accept the offer to return to work.

We feel strongly that the employee was fairly treated, and that the accusation was unjust. However, to resolve the charge at trial would result in infinite risk to the defendant. COP Construction has an employees pension trust for its people. I was informed that this trust, the life savings of employees, would be at total exposure. I simply could not risk that money. The deck is so stacked against a defendant, that our decision to accept pre-trial settlement was made. The deck is stacked so bad against the defendant that it almost precludes defending at a trial.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 13
DATE 031885
BILL NO HB 363

About three quarters of the suits filed in Montana are punitive damages suits. The reason for this is the helplessness of the defendent under the present condition of presumed and implied guilt.

Opportunistic plaintiffs led by trial attorneys recognize that fact. Request punitive damages and the suit is almost a sure winner. The combination of defending against implied malice, presumed guilt, with unlimited risk at punitive damages stack the deck so strongly that defense is hopeless. It is almost extortion. It just if not a fair arena.

The law needs to be corrected. I ask that you vote for this bill and work strongly to correct the injustice of the present Punitive Damages Act.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 13
DATE 031885
BILL NO. HB 363

REMARKS TO SENATE JUDICIARY COMMITTEE ON HB363

GOOD MORNING, MY NAME IS FRANCIS J. RAUCCI. I AM VICE PRESIDENT & GENERAL COUNSEL OF BUTTREY FOOD STORES WHICH DOES BUSINESS IN MONTANA AS BUTTREY FOOD & DRUG. I APPRECIATE THE OPPORTUNITY TO SPEAK ON BEHALF OF THE PASSAGE OF HB363, WITH THE PROPOSED AMENDMENTS, REGARDING SOME CONTROL, DEFINITION AND CLARIFICATION ON THE ISSUE OF PUNITIVE DAMAGES.

WHILE I AM AN ATTORNEY WHO HAS BEEN IN PRACTICE FOR TWENTY YEARS, I HAVE SPENT MOST OF MY CAREER AS AN EMPLOYEE OF BUTTREY, HANDLING ITS LEGAL MATTERS AS THEY RELATE TO OUR BUSINESS. THE PERSPECTIVE THAT I HOPE TO BRING TO THIS COMMITTEE TODAY IS THAT OF A BUSINESS MAN WHOSE COMPANY DOES THE MAJORITY OF ITS BUSINESS IN MONTANA. I AM SURE THAT YOU HAVE HEARD MUCH TESTIMONY REGARDING PUNITIVE DAMAGES, BOTH FROM A LEGAL AND BUSINESS PERSPECTIVE. THEREFORE, I WILL BE VERY BRIEF IN MY COMMENTS AND ATTEMPT TO SET FORTH 3 POINTS FOR YOUR CONSIDERATION. FIRST IS THE EFFECT OF THE PRESENT STATE OF THE LAW ON BUSINESSES IN MONTANA; SECONDLY, ARE THE ABERATIONS THAT HAVE OCCURRED IN THE LAW AS THEY PERTAIN TO OUR BUSINESS; AND, LASTLY, THE NEED FOR SOME STANDARD OF CONDUCT THAT WILL PERMIT PREDICTABILITY OF RESULT AND THEREFORE PROVIDE A REASONABLE BASIS FOR CONDUCT.

1. <u>EFFECT ON BUSINESS IN MONTANA</u>: LET ME START THIS CONCERN WITH THE ANTICIPATION OF THE CRITICISM THAT THIS IS A BIG, OUT OF STATE BUSINESS CONCERN THAT IS PART OF AMERICAN STORES COMPANY, A NATIONAL RETAIL ORGANIZATION.

   BUTTREY HAS OPERATED IN MONTANA FOR OVER 75 YEARS. IT IS NOT OPERATED FROM CHICAGO OR SALT LAKE CITY BUT, RATHER, FROM GREAT FALLS. IT HAS AUTONOMY IN ITS OPERATING, MERCHANDISING AND ADVERTISING DECISIONS. ITS REAL ESTATE DECISIONS -

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 031885
BILL NO. HB 363

ARE RESULTS OF VYING FOR CAPITAL AMONG THE OTHER CONSTITUENT AMERICAN STORES COMPANIES WHICH I WILL EXPLAIN BELOW.

IN THE MAIN, ITS EMPLOYEES ARE MONTANANS OR PEOPLE, LIKE MYSELF, WHO HAVE HAD THE ADVANTAGE OF BEING ABLE TO COME TO MONTANA AND MAKE A LIVING. BUTTREY RISES OR FALLS ON THE BASIS OF THE PERFORMANCE OF EACH OF ITS STORES. TO PUT IT IN AGRARIAN TERMS: EITHER THE COW CONTINUES TO GIVE MILKED OR IT BECOMES HAMBURGER. BUTTREY HAS 57 UNITS IN SEVEN STATES OVERALL WITH 28 STORES IN MONTANA OR 49% OF THE TOTAL. I AM NOT AT LIBERTY TO GIVE YOU OUR TOTAL SALES FIGURES BUT MONTANA PRODUCES 46% OF OUR TOTAL SALES. OF THE 4356 NUMBER OF EMPLOYEES IN THE COMPANY, 1907 ARE WORKING IN MONTANA. FOR A 43% OF TOTAL WORK FORCE AND A 47% OF TOTAL PAYROLL DOLLARS.

WE ARE LARGELY SELF-INSURED FOR THE KINDS OF RISKS THAT WOULD BRING ABOUT ALLEGATIONS OF CONDUCT ON WHICH PUNITIVE DAMAGES COULD BE BASED. IN THAT CONNECTION, WE PRESENTLY HAVE 16 LAWSUITS IN THE SEVEN STATES, OF WHICH 13 ARE IN MONTANA. THE INTERESTING PART IS THAT ALL OF THESE SUITS, EXCEPT ONE FILED IN THE LAST THREE WEEKS, ARE WHAT ARE CALLED "PREMISES LIABILITY CASES"...SIMPLY STATED, THEY ARE SLIP AND FALL CASES WHERE DAMAGE IS OCCASIONED BY FALLING ON THE PARKING LOT OR ON A GRAPE OR PRODUCE ITEM OR WATER ON THE FLOORS OF OUR STORES. WE FIND ALLEGATIONS OF "FRAUD", "OPPRESSION", "KNOWLEDGE OF FACTS WHICH CREATE A HIGH DEGREE OF RISK TO SUBSTANTIAL INTERESTS OF ANOTHER" IN EVERY COMPLAINT FILED IN MONTANA SINCE JANUARY 1, 1984.

HAVING STATED THAT PROBLEM, WHAT IS ITS RELATION TO OUR BUSINESS? AS I MENTIONED A FEW MOMENTS AGO, OURS IS A PROFIT CENTER ORIENTED BUSINESS. THAT MEANS THAT EACH STORE IS ON ITS OWN FOR THE PRODUCTION OF SALES AND THE RESPONSIBILITY FOR EXPENSE

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 031885
BILL NO. HB 363

WHICH INCLUDE CLAIMS, SETTLEMENTS OR JURY AWARDS - GENERAL, SPECIAL AND PUNITIVE DAMAGES. WHEN WE MEASURE THE EFFECT OF THAT EXPOSURE IN MONTANA, IT IS A LITTLE LIK BUTTREY RUNNING A RACE WITH SNOW SHOES WHEN OUR MAJOR, CHAIN STORE COMPETITORS ARE RUNNING WITH TRACK SHOES. THE NUMERATOR OF OUR STORES IN MONTANA TO TOTAL STORES IS MUCH LARGER THAN THE SAME NUMERATOR OF MONTANA STORES TO TOTAL STORES FOR CHAIN A AND CERTAINLY MUCH GREATER THAN CHAIN S. AN EXPOSURE FOR THESE COMPETITORS IN MONTANA CAN BE OFFSET BY OPERATIONS ELSEWHERE. WITH BUTTREY, MONTANA IS OUR HOME REGARDLESS OF WHO OWNS THE STOCK AND THERE IS NO OTHER PART OF THE COUNTRY TO "LAY OFF THE LOSSES". THAT EXPOSURE CAUSES REAL CONCERNS ABOUT CONTINUING TO CENTER OUR NON-STORE OPERATIONS AND ADMINISTRATION IN THE STATE. WHY RUN THE RISK OF DOING MORE THAN OPERATING CERTAIN STORES? WHY NOT MOVE THE CENTER OF THE COMPANY OUT OF GREAT FALLS? IT IS LETTING THE LEGAL TAIL WAG THE BUSINESS DOG IN THE DECISION AS TO WHERE TO OPERATE. IT SHOULD BE A BUSINESS DECISION BASED UPON NON-LEGAL REASONS, YET IT IS A STRONG STICK IN THE BUNDLE OF STICKS WEAPON IN MONTANA USED AGAINST OUR COMPANY.

IT HAS TO BE A CONSIDERATION WHEN A COMPANY SUCH AS BUTTREY COMPETES WITH OTHER SIBLING COMPANIES FOR CAPITAL DOLLARS FROM THE SAME PARENT.

IT HAS TO BE A CONSIDERATION WHEN DETERMINING WHERE TO ERECT A NEW DISTRIBUTION SITE TO SUPPORT OUR EXPANDED DRUG BUSINESS IN THE SEVEN STATES IN WHICH WE OPERATE. I STRONGLY DISAGREE WITH THE ASSERTION THAT PUNITIVE DAMAGES ARE AIMED AT LARGE COMPANIES THAT DO BUSINESS OUTSIDE OF MONTANA AND THEREFORE DO NOT ADVERSELY AFFECT BUSINESS IN THIS STATE. I AM SURE THAT YOU HAVE HEARD FROM SMALL AND MEDIUM-SIZED BUSINESSES IN THE STATE ON THAT SUBJECT BUT, LET ME GIVE YOU ANOTHER PERSPECTIVE...THAT OF A LARGE MULTI-STATE COMPANY. IN THE COMPETITION FOR CAPITAL DOLLARS, A COMPANY SUCH AS BUTTREY COMPETES WITH OTHER CONSTITUENT OPERATING COMPANIES THAT MAKE UP THE CHAIN. MONTANA IS SPARSELY POPULATED AND

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 03/18/85
BILL NO HB 363

THUS WE GO IN AT A DISADVANTAGE FOR THOSE CAPITAL DOLLARS. THE DENSITY IN STATES SUCH AS CALIFORNIA, ILLINOIS AND PENNSYLVANIA, TOGETHER WITH A RAPID GROWTH IN THE SUN BELT, INDICATE THAT A GREATER RETURN ON INVESTMENT IS POSSIBLE IN THOSE PLACES. WHEN WE SUPERIMPOSE THE RISK AND ADDITIONAL COST THAT PUNITIVE DAMAGE DEFENSE ADDS IN MONTANA, IT CAN BE AN INSURMOUNTABLE BURDEN. THAT EFFECT IS TO REDUCE CAPITAL EXPENSE IN THIS STATE AND THUS REDUCE EMPLOYMENT AND GROWTH. WHILE OTHERS MAY TAKE OUR PLACE, IT WILL NOT BE WITH THE SAME INVESTMENT AND EMPLOYMENT COMMITMENT.

2. ABERATIONS AS THEY HAVE OCCURRED IN THE LAW: OUR BUSINESS IS THE BUSINESS OF DISTRIBUTING AND SELLING MERCHANDISE TO THE CONSUMING PUBLIC. MOST OF OUR SALES ARE OF FOOD AND HOUSEHOLD PRODUCTS AND OUR OPERATIONS RANGE FROM THE SMALL TOWN GROCERY STORE IN HARLEM AND CHINOOK TO A SUPER DRUG AND FOOD COMBINATION STORE FORMAT IN LARGER CITIES IN THE STATE. WE ARE A HEAVILY REGULATED BUSINESS AND THAT IS AS IT SHOULD BE SINCE WE ARE SELLING FOOD, HEALTH AND BEAUTY AIDS AND PRESCRIPTIONS THAT MUST BE WHOLESOME BEFORE APPLICATION AND USE. THE IRONY OF IT IS THAT WE HAVE ONLY ONE CASE OF THE 13 THAT I HAVE SET OUT ABOVE THAT CLAIMS THAT WE ARE CHARGED WITH A BREACH OF OUR RESPONSIBILITY IN VENDING WHOLESOME PRODUCTS AND, THERE IS NO CLAIM FOR PUNITIVE DAMAGES.

RATHER, WE HAVE THE PERSON WHO FALLS AND INJURES HIM OR HERSELF IN OUR STORE OR PARKING LOT EITHER ON SNOW, ICE, WATER OR SOMETHING ON THE FLOOR. CERTAINLY THOSE INJURIES CAN BE PAINFUL AND TEMPORARILY DISABLING BUT THERE HAVE BEEN NO FATALITIES, NO PARALYSIS, NO BRAIN DAMAGE OR OTHER SERIOUS AND LASTING INJURIES OCCASIONED IN MOST OF THESE CLAIMS. YET WE STILL SEE DEMANDS FOR PUNITIVE DAMAGE BECAUSE OUR CONDUCT WAS OUTRAGEOUS OR FRAUDULENT OR OPPRESSIVE OR MALICIOUS.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 031885
BILL NO. HB 363

WE SHOULD ALSO LOOK AT THE PEOPLE WHOSE CONDUCT IS MEASURED BY THE PUNITIVE DAMAGES. THESE ARE NOT "EXECUTIVES" OR "OUT OF STATE INTERESTS" BUT RATHER WORKING PEOPLE IN OUR STORES. THEY ARE CHECKERS, PRODUCE CLERKS, TRUCK DRIVERS, STOCK CLERKS AND THE LIKE. THEY LIVE, WORK AND DERIVE THEIR LIVELIHOOD FROM THE OPERATION OF OUR STORES IN THESE COMMUNITIES. WHAT WE ARE DOING IN THIS STATE IS MAKING THE MISTAKE OF THE WORKING MAN AND WOMAN EQUAL TO A MALICIOUS ACT.

3. STANDARD OF CONDUCT: IF YOU WILL PERMIT ME TO SPEAK AS AN ATTORNEY, I FEEL THAT PUNITIVE DAMAGES, WHICH HAVE A QUASI CRIMINAL FLAVOR TO THEM, HAVE BEEN BROADENED TO PUNISH DEFENDANTS FOR CONDUCT THAT, IN MOST OTHER STATES AND OTHER TIMES IN THIS STATE, HAVE BEEN LIMITED TO MONEY FOR PAIN, SUFFERING, LOSS OF EMPLOYMENT AND QUALITY OF LIFE AND THE LIKE. I DO NOT FEEL HB363 GOES FAR ENOUGH IN DEFINING CONDUCT, THAT IS SO REPREHENSIBLE AS TO REQUIRE PUNITIVE DAMAGES, BUT FEEL STRONGLY THAT THE KIND OF CASE THAT WE ARE INVOLVED IN WAS NEVER MEANT TO HAVE THE WINDFALL OF PUNITIVE DAMAGES AVAILABLE TO THE PLAINTIFF AND HIS OR HER ATTORNEY. I WOULD GO FARTHER IN SUBSECTION TWO (2) OF THE BILL AND PROPOSE THAT THE COLORADO STANDARD OF "BEYOND A REASONABLE DOUBT" BE SUBSTITUTED FOR "CLEAR AND CONVINCING EVIDENCE" AS THE STANDARD APPROVED NECESSARY TO FIND CONDUCT SO REPREHENSIBLE THAT PUNITIVE DAMAGES CAN BE CLAIMED. A PRINCIPAL PURPOSE OF LAW IS THE REGULATION OF CONDUCT. IN TURN, CONDUCT MUST BE KNOWN TO BE AVOIDED OR ACTED UPON. THE PRESENT STATE OF THE LAW ALLOWS NEITHER.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 031885
BILL NO. HB 363

Colorado Revised Statutes

Law reviews. For article, "One Year Review of Evidence", see 35 Dicta 44 (1958). For article, "One Year Review of Domestic Relations", see 41 Den. L. Ctr. J. 97 (1964).

The presumption of legitimacy is one of the strongest known to law, and, prior to the adoption of this section, could be overcome only by proof of nonaccess or impotency of the husband; the rule has now been broadened by this section with respect to blood tests in cases where definite exclusion is established. Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963).

But, under this section, a reputed father is entitled as a matter of right to have blood tests made and to have such tests received in evidence when definite exclusion is established and proper foundation therefor is laid. Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963).

Conclusive evidence overcomes presumption of legitimacy. Where accuracy of blood test relating to paternity of child was not challenged by the mother and shows conclusively that husband could not have been the father of the child, the evidence of such tests was competent and sufficient to overcome the presumption of legitimacy. Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963).

It is abundantly clear that the general assembly intended the section for paternity proceedings to be the only vehicle for establishing paternity because under the statute the putative father has the right to trial by jury in paternity proceedings and blood grouping tests may be ordered by the court and received as evidence, whereas the statute on support proceedings allows neither of the above. In re People In Interest of L.B., ___ Colo. ___, 498 P.2d 1157 (1972), dismissed, 410 U.S. 976, 93 S. Ct. 1497, 36 L. Ed. 2d 173 (1973).

13-25-127. *Civil actions - degree of proof required.* (1) Any provision of the law to the contrary notwithstanding and except as provided in subsections (2) and (3) of this section, the burden of proof in any civil action shall be by a preponderance of the evidence. The provisions of this subsection (1) shall not apply to the burden of proof required in determining the validity of any legislative enactment.

(2) Exemplary damages against the party against whom the claim is asserted shall only be awarded in a civil action when the party asserting the claim proves beyond a reasonable doubt the commission of a wrong under the circumstances set forth in section 13-21-102. Nothing in this subsection (2) shall be construed as preventing a party asserting the claim from being awarded money damages or other appropriate relief, other than exemplary damages, if he sustains the burden of proof by a preponderance of the evidence.

(3) Execution against the body of a party against whom the claim is asserted shall be awarded only when the party asserting the claim proves beyond a reasonable doubt the commission of a tort under the circumstances set forth in section 13-59-103. Nothing in this subsection (3) shall be construed as preventing a party asserting the claim from being awarded money damages or other appropriate relief, other than execution against the body of a party against whom the claim is asserted, if he proves the commission of a tort by a preponderance of the evidence.

(4) This section became effective July 1, 1972, and applies only to civil actions which accrue on or after such date.

Source: L. 71, p. 579, § 1; C.R.S. 1963, § 52-1-28; L. 72, pp. 317, 318, §§ 1, 2.

Cross references. As to exemplary damages, see § 13-21-102. As to body execution in tort, see § 13-59-103.

Am. Jur. See 29 Am. Jur.2d, Evidence, §§ 127, 132, 133.

C.J.S. See 32A C.J.S., Evidence §§ 1016-1025.

As to section's application to heirship. See In re Estate of Etchart v. Nelson, ___ Colo. ___, 500 P.2d 363 (1972).

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 031885
BILL NO. HB 363

II.

Petitioners next contend that the trial court erred in granting the Central Bank's motion for judgment on the pleadings on their claim for exemplary damages pursuant to section 13-21-102, C.R.S. 1973. We disagree.

The trial court ruled that exemplary damages were only available in cases involving injury to person or property, or more particularly for tortious conduct. It then concluded that the statute did not apply because petitioners' claim was equitable.

Exemplary damages are available in Colorado only pursuant to statute. Ark Valley Alfalfa Mills, Inc. v. Day, 128 Colo. 436, 263 P.2d 815 (1953). Section 13-21-102, C.R.S. 1973, provides:

"Exemplary damages. In all civil actions in which damages are assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages."

In interpreting this statute, we have held that punitive damages are not recoverable in actions in equity. See Miller v. Kaiser, 164 Colo. 206, 433 P.2d 772 (1967); Littlejohn v. Grand International Brotherhood of Locomotive Engineers, 92 Colo. 275, 20 P.2d 311 (1933); see also Poertner v. Razor, 500 P.2d 989 (Colo. App. 1972). Thus, our conclusion in part I of this opinion that petitioners' action was equitable in character is dispositive of this issue. The trial court properly granted Central Bank's motion to dismiss the claim for exemplary damages.

Rule discharged.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 031885
BILL NO. HB 363

The reputation Montana has developed as an anti-business state stems partially from the law suits that have received so much notoriety in the national press. Last December, I was in Washington, D. C., at an American Bankers Association Government Affairs meeting. We have name tags showing the state that we are from and in visiting with a banker from Pennsylvania, he made mention that a customer of his had planned to open a large manufacturing business in Montana. Being eager for new business for our Great Falls community, I inquired if his client had a location in mind and when he might be coming and what we might do to assist him in establishing a plant in Great Falls. To these questions, the Pennsylvania banker replied, "No, his customer had decided to establish his plant in New Mexico because of the anti-business climate in Montana." When I asked further about this, he stated that his customer had told him that he had researched the issue and found that Montana had laws that made it very easy to be sued and that damage suits were extremely large and that it was a good place to stay away from. He also mentioned that tax laws in New Mexico were much more conducive to a new business.

How many more cases of businesses avoiding Montana because of the Punitive Damage suits that have been filed and handled in Montana, I do not know, but I am certain that these cases are certainly increasing costs and diminishing the availability of credit across the face of Montana.

We need to limit the punitive damage issue. HB363 will be a constructive step in that direction.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 15
DATE 031885
BILL NO. HB 363

TESTIMONY for the Montana Senate Judiciary Committee
Monday, March 18, 1985 at 10:00 a.m.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 15
DATE 031885
BILL NO. HB 363

Gentlemen:

My name is Bob Reiquam and I am President of the First Banks Great Falls, Great Falls, Montana. I am here to ask for your support in controlling the most anti-business issue confronting Montanans today. I am talking, of course, about the Punitive Damage or sometimes called Bad Faith law suits which are threatening the very existence of every business, every organization, and every individual that takes a stand or action on any issue.

The Punitive Damage issue has been particularly detrimental to commercial banks and their customers. The cases that have been heard, as well as those threatened, cause every banker to wonder if it is worth it to make another loan. In the event of non-payment of loans, we find it is absolutely impossible to conduct the necessary steps for recourse without being threatened with a law suit that could not only wipe out the bank's entire capital but also takes hours of time, causes untold frustration and anxiety, and ultimately makes it that much more difficult for the next customer to obtain credit.

Interest costs are higher because of the need to hire attorneys to look at each and every transaction, because of the increased costs of insurance when it is available, and because of all of the extra steps one must take in trying to protect yourself, even though that may be impossible.

Many loans are not made because of the threat of a business being sued or because of a business suing in the event any little thing goes wrong. Law suits are foremost on the minds of many of these people, especially when the rewards are as great as those we hear about.

WILLIAM G. STERNHAGEN
CHAIRMAN, BOARD OF DIRECTORS
S. KEITH ANDERSON
PRESIDENT

MONTANA TAXPAYERS Association

SINCE 1921 MONTAX

P O BOX 4909 1706 NINTH AVENUE HELENA MONTANA 59604 406 442-2180

S. KEITH ANDERSON

MONTANA TAXPAYERS ASSOCIATION

IN SUPPORT OF H. B. 363

SENATE JUDICIARY COMMITTEE

MARCH 18, 1985

UNDER CURRENT MONTANA LAW ANYONE DOING BUSINESS IN MONTANA IS FAIR GAME FOR PUNITIVE DAMAGE LAWSUITS. THIS INCLUDES RANCHERS AND FARMERS, THE PROFESSIONS AND PEOPLE DOING BUSINESS UP AND DOWN MAIN STREET. THOSE BRINGING THE LAW SUITS HAVE LITTLE IF ANYTHING TO LOSE, NO MATTER HOW CAPRICIOUS THE ACTION. BUT THOSE WHO MUST FACE THE LAW SUITS HAVE COURT COSTS, ADVERSE PUBLICITY, MENTAL AGONY AND THE POSSIBILITY OF A JURY DECISION DESTROYING THEIR BUSINESS AND PERSONAL ASSETS. THEY CAN NOT EVEN BE PROTECTED BY PROCESS OF BANKRUPTCY.

SOME PROTECTION MUST BE ACCORDED THE CITIZEN FROM THOSE WHO WOULD INDISCRIMINATELY USE THE COURT SYSTEM TO THEIR MONETARY ADVANTAGE. IF NOT, PEOPLE DOING BUSINESS IN THIS STATE WILL BE HARD PRESSED TO OBTAIN INSURANCE, MUCH LESS PAY FOR IT. AN INDIVIDUAL SHOULD NOT BE FORCED TO LIVE AND DO BUSINESS WITHOUT SOME PROTECTION UNDER THE LAW FROM PUNITIVE DAMAGE LITIGATION.

HOUSE BILL 363, GIVES SOME PROTECTION TO THE INDIVIDUAL THROUGH DEFINITION OF TERMS AND PLACES AN OBLIGATION UPON THE PLAINTIFF TO PRESENT CLEAR EVIDENCE A COMPENSATORY WRONG HAS TAKEN PLACE. LIKEWISE IT OFFERS SOME FINANCIAL LIMIT ON DAMAGES THAT MAY BE AWARDED.

I URGE YOUR SUPPORT AND PASSAGE OF H.B. 363.

SENATE JUDICIARY COMMITTEE
EXH'BIT NO. 16
DATE 031885
BILL NO. HB 363

STATEMENT OF PURPOSE

The purpose of Senate Bill 200 is to deter claims for punitive or exemplary damages that are not clearly based in fact and, to that end, the Montana Legislature intends for this amendment to be used in combination with early and ready application of Summary Judgment Orders pursuant to Montana Rule of Civil Procedure 56 where such claims are not based in fact, and the application of those sanctions provided for in Montana Rule of Civil Procedure 11 against those parties responsible for making such claims.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 031885
BILL NO. HB 363

MAJOR CORPORATE SALES AND PROFITS

FOR FISCAL YEAR 1983

The following are examples of assets, sales, and profits for major American corporations for fiscal year 1983. They are taken from the April 30, 1984, issue of Forbes magazine.

INSURANCE INDUSTRY

Company	Assets ($ mil.)	Sales ($ mil.)	Net Profits ($ mil.)
Aetna Life and Casualty Co.	47,626	14,411	325.2
CIGNA	35,117	12,564	400.5
Safeco	3,415	1,643	133.3
St. Paul Companies	5,595	2,321	126.8
USF&G	5,279	2,387	171.5

DRUG COMPANIES

Company	Assets ($ mil.)	Sales ($ mil.)	Net Profits ($ mil.)
Johnson & Johnson	4,461	5,973	547.0
American Home Products	3,086	4,856	627.2
Bristol Myers	3,007	3,917	408.0
Pfizer	3,936	3,750	447.1
American Hospital Supply	2,280	3,310	211.9

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
D 031885
BILL NO. HB 363

DRUG COMPANIES, continued

Company	Assets ($ mil.)	Sales ($ mil.)	Net Profits ($ mil.)
Merck	4,215	3,246	450.9
Warner-Lambert	2,919	3,108	200.5
Eli Lilly	3,414	3,034	457.4
Abbott Laboratories	2,824	2,928	347.6
A.H. Robins	510	563	58.2

AUTOMOTIVE MANUFACTURING

Company	Assets ($ mil.)	Sales ($ mil.)	Net Profits ($ mil.)
GM	45,694	74,582	3,730.2
Ford	23,869	44,455	1,926.9
Chrysler	6,772	13,240	525.8

TIRE AND RUBBER

Company	Assets ($ mil.)	Sales ($ mil.)	Net Profits ($ mil.)
Goodyear	5,985	9,736	331.5
Firestone	2,579	3,998	98.0
Goodrich	2,576	3,192	14.7
General Tire	1,853	2,184	70.8
Uniroyal	1,486	2,040	52.3

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 031885
BILL NO. HB 363

PERSONAL CARE PRODUCTS

Company	Assets ($ mil.)	Sales ($ mil.)	Net Profits ($ mil.)
Proctor and Gamble	8,361	12,633	886.0
Colgate/Palmolive	2,664	4,865	186.2
Avon Products	2,286	3,000	164.4
Revlon	2,215	2,379	109.0
Gillette	1,696	2,183	145.9

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 031885
BILL NO. HB 363

the way back, Polanchek said. The train, equipped with a steel cowcatcher, was not damaged, he said.

• **UNION CARBIDE FINED.** Union Carbide Corp., still reeling from December's toxic-gas disaster in Bhopal, India, was assessed a $3.9 million federal fine Friday after failing for four years to disclose evidence that another of its chemicals causes cancer in laboratory animals. The Environmental Protection Agency said in Washington, D.C., that Union Carbide waited until September 1983 to notify the agency of a 1979 study indicating that diethyl sulfate, a compound used to make dyes, drugs and textile finishing compounds, causes skin cancer in laboratory mice. Union Carbide officials in Danbury, Conn., declined to comment until they had seen the EPA accusations.

[redacted]

• **CHINA BACKS DOWN.** Despite a recent warning,

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 031885
BILL NO. HB 363

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 03/18/85
BILL NO. HB 363

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

56.1 References

6, 6 Pt 2 Moore's Federal Practice, Chapter 56.

3A Bender's Federal Practice Forms, Rule 56, Form No. 3291, et seq.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

11.1 References

2A Moore's Federal Practice, Chapter 11.

2 Bender's Federal Practice Forms, Rule 11, Form No. 2137, et seq.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 031885
BILL NO. HB 363

1 Moore's Manual–Federal Practice and Procedure, § 9.08.

1 Moore's Manual–Federal Practice Forms, Form No. 9:21, et seq.

11.2 History of Rule

[1]—General History

Rule 11 was amended in 1983.

[2]—1983 Amendment to Rule 11

Rule 11 was amended, effective August 1, 1983, as follows (matter stricken out is in brackets; new matter is in italics):

Rule 11. Signing of Pleadings, *Motions, and Other Papers; Sanctions.* Every pleading, *motion, and other paper* of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, *motion, or other paper* and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney *or party* constitutes a certificate by him that he has read the pleading, *motion, or other paper;* that to the best of his knowledge, information, and belief [there is good ground to support it, and that it is not interposed for delay] *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.* If a pleading, *motion, or other paper* is not signed, *it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.* [or if signed with intent to defeat the purpose of this rule, it may stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.] *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

[3]—Advisory Committee's Note to 1983 Amendment of Rule 11

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 64–65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, *Federal Practice* ¶7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, *e.g., Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980); *Hall v. Cole,* 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, *e.g., Browning Debenture Holders' Committee v. DASA Corp.,* 560 F.2d 1078 (2d Cir. 1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. See, *e.g., Heart Disease Research Foundation v. General Motors Corp.,* 15 Fed. R. Serv. 2d 1517, 1519 (S.D.N.Y. 1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n,* 365 F.Supp. 975 (E.D. Pa. 1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See *Nemeroff v. Abelson,* 620 F.2d 339 (2d Cir. 1980).

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 03/85
BILL NO HB 363

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations. See *Haines v. Kerner,* 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed. R. Civ. P. 11,* 61 Minn. L. Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See *Murchison v. Kirby,* 27 F.R.D. 14 (S.D.N.Y. 1961); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. See *North American Trading Corp. v. Zale Corp.*, 73 F.R.D. 293 (S.D.N.Y. 1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969); 2A Moore, *Federal Practice* ¶ 11.02, at 2104 n.8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See *Browning Debenture Holders' Committee v. DASA Corp.*, *supra*. This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 03/18/85
BILL NO. HB 363

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regime will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

[4]—Comment on Rule 11 as Amended in 1983

Together with new Rule 7(b)(3), see *7.2[4], supra*, the 1983 amendment to Rule 11 makes clear that the signing requirement of Rule 11 applies to motions and other papers, as well as to pleadings. The goal of amended Rule 11 is to facilitate the imposition of sanctions by the court, upon motion or upon its own initiative, in order to deter pleading and motion abuses. The amendment emphasizes the attorney's responsibilities and reinforces those obligations by the imposition of sanctions. Upon violation of the duties imposed by the Rule, sanctions shall be imposed on the signing attorney, the represented party, or both. In addition, sanctions shall also be imposed on an unrepresented party who signs the pleading, motion, or other paper in violation of the requirements of Rule 11.

The provision of the original Rule providing for the striking of a pleading or motion as sham and false, and the former reference to the inclusion of scandalous or indecent matter, has been deleted. As to the striking of a pleading or motion as sham and false, it was the Advisory Committee's

position that such matters are best raised by motion under Rules 8, 12 or 56. As to the striking of scandalous or indecent matter, the Advisory Committee stated that such matter could be stricken under Rule 12(f) or under the more general language of amended Rule 11. While the amendment also deleted the former reference to willfulness as a prerequisite for subjecting an attorney to disciplinary action, the state of his or the party's actual or presumed knowledge should be considered by the court in determining the nature and severity of the sanction to be imposed.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 031885
BILL NO. HB 363

11.3 Verification Not Required Except by Rule or Statute

The Tucker Act, which permits suits against the United States on "contract" claims, formerly required verification of the initiating pleading, called the petition. 28 USC § 762 (1940). There is nothing in the Code of 1948 which requires the complaint to be verified in either "Tucker Act" or tort claims suits. 28 USC §§ 1346, 1402, 2671–2680.

The federal interpleader statute also required the complaint to be verified. Verification is no longer required in statutory interpleader actions under the new Code. ¶ 22.06.

For the effect to be given pleadings, including verified pleadings, on a motion for summary judgment, see ¶ 56.11[3], and analysis under Rule 56, *infra.*

As to verification in proceedings brought within admiralty jurisdiction, see ¶ .52[3].

11.4 Attorney's or Party's Certification; Sanctions

Under Rule 11, as amended in 1983, the attorney or party signing the pleading, motion or other paper certifies "that to the best of his knowledge, information and belief *formed after reasonable inquiry* it is well grounded in fact and . . . law. . . ." (emphasis added). There is an affirmative duty placed on the attorney or party to investigate the facts and the law prior to the subscription and submission of any pleading, motion or paper. Where the pleading, motion or paper is signed in contravention of the dictates of Rule 11, the court, on its own or upon motion by a party, shall impose suitable sanctions on the attorney who signed it, the party represented by the attorney, or both persons. ¶ 11.02[2].

In two recent cases, sanctions were imposed for violation of Rule 11's certification requirement. In *Viola Sportswear, Inc. v. Mimun* (ED NY 1983) 574 F Supp 619, defendants sought attorneys' fees following the grant of their unopposed summary judgment motion in an action for trademark infringement, deception and unfair competition. Noting that plaintiff had alleged a nationwide conspiracy based on the sale of one pair of jeans without having investigated the facts prior to filing the complaint or conducting an inquiry as to the validity of the charges, the district court granted defendants' attorneys' fee application. Setting out Rule 11's certification requirement, including its provision for making a reasonable inquiry, the court added that the Rule also provides for sanctions for its violation, which may include the imposition of reasonable attorneys' fees. In assessing such fees against the plaintiff and its attorneys jointly and severally, the court determined that no inquiry was made to lend some assurance that the allegations of plaintiff's complaint were well grounded in fact.

Similar sanctions were imposed under Rule 11 in *Wold v. Minerals Engineering Co.* (D Colo 1983) 575 F Supp 166. In that case plaintiff moved to disqualify the law firm representing defendant, alleging that in a prior matter the law firm had received confidential information about the plaintiff which related to the present suit. Denying the motion, the district court held that plaintiff failed to establish any grounds for disqualification. Granting defendant's motion for the imposition of Rule 11 sanctions, the court determined that plaintiff's counsel failed to make the "reasonable inquiry" required by amended Rule 11 since no personal interviews of knowledgeable witnesses were conducted, limited telephone inquiries did not meaningfully address the facts, and plaintiff's attorneys received information contradicting the assertions in their motion which should have put them on notice. Concluding that plaintiff's attorneys violated Rule 11, the court stated that it was compelled by Rule 11 to impose appropriate sanctions, and ordered plaintiff's counsel to pay the reasonable expenses incurred by defendant because of the disqualification motion.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I read about lawsuits in the papers which sometimes ask for skyrocket figures in punitive and exemplary damages and I have wondered if some sort of rational limit can't be placed on it.

But I'm also aware that any blanket and mechanical rule you lay ~~down, corporations~~ may sooner or later hurt little people. That is my concern this morning. As a neighbor and most especially as a pastor, I know the ~~xxxx~~ agony already caused individuals seeking appropriate damages for injury and the endless delays by corporations who play the advantages of holding punitive payments and drawing their interest as over against paying up promptly.

House Bill 363, in setting an upper limit for punitive and exemplary damages serves to increase the liklihood of such delay in unfairness to common people when they are the plaitiffs.

It would appear to be the old conflict between benefits to very big business and the rights of ordinary citizens. Efficient is important. & ~~Compassion is even more important~~. Therefore I urge your defeat of this bill.

REV ROBERT M. HOLMES
PASTOR, ST. PAUL'S UNITED
METHODIST CHURCH,
HELENA

(& BUT NOT AT THE EXPENSE OF COMPASSION)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 18
DATE 031885
BILL NO. HB 363

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 19
DATE 031885
BILL NO. HB 363

Coal Engineer ... Lawyer Lawsuit
Sign in Sheet Lobbyist Pat Tully

I am here as a Concerned Citizen against House Bill # 363.

My name is Pat Tully, I am a ranchers wife from Cascade County. We were awarded a large Amount of punitive damages in a case against a large corporation bank. This bank is not worth millions but billions of Dollars.

It is also my understanding that Mike Anderson, Attn. for Norwest Bank testified on the preliminary hearing into house on this bill and used our Case as an example of why there should be limits on punitive damages. It was very Unethical for Mr Anderson to use our case as an example when it is still pending in the Supreme Court + there were Supreme Court judges present at that hearing. Mr Anderson did not tell the legislative Committee on our Case. He in effect told them we had lost only a small amt of $ the Jury awarded us 119,000 in Actual Damages plus a 1,000,000 Dollars in Punitive Damages. The Punitive Damage Pin on our Case was upon. What Mr. Anderson didn't tell them was the oppressive Conduct

Main Capitol Building to Top Floor
old Supreme Court Chambers
Senate Judiciary Committee

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 19
DATE 031885
BILL NO. HB 363

The lack of Cooperation by the large Corporation Bank + the harassment we received by them for the past five years has caused our family 5 years of agony + damaging us not only monetarily but mentally + emotionally as well. We feel we have been put through the ringer. + this is why I tell you cannot legislate the damages that can be awarded. without knowing a specific case

My Point is this.

If you put a limit on punitive damages you are in effect saying you have no faith in our jury system. The same 12 people that sat on that jury also voted you into office. Let me remind you that 12 unbiased people sat on the jury that heard our case and after hearing both sides they felt it necessary to punish the bank so they would not treat anyone else the way they ~~are~~ treating us. Each case is so individual you cannot regulate by law on amounts that should or should not be awarded without knowing the specifics about

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 19
DATE 031885
BILL NO. HB 363

for the lawsuit. He didn't tell you that we tried numerous times in person and by letter to stop what they were doing. We finally hired an attorny + he phoned + told them + they still continued their oppressive + unfair actions. He wrote them a letter which they ignored + lost. In order to get their attention we were forced to file suit against them + even then they charged us for giving us information on our own checking account. So it doesn't surprise me that they are still up to their oppressive + unfair tactics. The fact that the Montana Supreme Court proves it is difficult for an individual to fight a large corporation. One of the things that evens it up is that fact that punitive damages is the only thing that can keep a large corporation from running over a small individual like the NW Bank has done to us.

NAME: Bruce Wheatty DATE: March 18, 1955

ADDRESS: Box 413, Ellister

PHONE: 492-7516

REPRESENTING WHOM?

APPEARING ON WHICH PROPOSAL: HB 363

DO YOU: SUPPORT? AMEND? OPPOSE? X

COMMENTS: Corporations already hold more power to delay settlements, delaying until the individual exhausts physical, emotional and financial assets. There is already, because of this corporate power, an inequality before the law. Passage of this bill would discourage corporations from settling promptly, out of court, and would encourage them to continue to delay.

Let's just leave it up to the citizens on juries to decide in each individual case what damages might be appropriate.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 20
DATE 031885
BILL NO. HB 363

Eleanor Dunn

607 Avenue F
Billings, Montana
March 15, 1985

The Hon. Joe Mazurek, ~~Chairman~~
Senate Judiciary Committee
~~Capitol Station~~
~~Helena~~, Montana

Dear Senator Mazurek:

It has come to my attention that during this session a number of bills which would revise the Montana laws relating to punitive damages have been introduced. Of these, I am most concerned about House Bill 363 which I understand is scheduled for hearing by the Senate Judiciary Committee on Monday, March 18. If I had known of this bill sooner it might have been possible for me to be in Helena to testify in person.

Had this bill been introduced in an earlier session, I must admit that it probably would not have received my attention, for there would have been no awareness on my part of the implications of such legislation either to me personally or to others who may become victims or victim survivors in Montana. Because my daughter, Shannon, was shot and killed by bear hunters in the Gardiner area in the summer of 1982, I have become an observer-participant in both criminal and civil processes which leave me at times in total disbelief and at other times in total despair.

It is very difficult, Senator Mazurek, to intellectualize about something which, because of circumstance, has such an overwhelming emotional component. However, I feel that what I have experienced makes it possible for me to do so in ways that represent reality to a degree much greater than those available to most others.

House Bill 363, to me, disinvests Montana in the jury system and the rights of individuals to use that system in securing justice. This bill seems to impute some special kind of prescience to this particular assembly which makes it possible for it to look into the future and predict what will constitute justice for events and actions that have yet to occur. I doubt that any of us, even at our very best and with all the knowledge we have accumulated over years, can look ahead and determine how both morality and accountability can be insured in situations involving unique individuals and unique happenings.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 20
DATE 031885
BILL NO. HB 363

I believe in the jury system, even with its obvious shortcomings, and in the appeals process which accompanies it. The jury system did not fail Shannon or me in the criminal action. The man who killed my daughter was found guilty of negligent homicide in the county in which he lived and in which my daughter was killed.

The devaluation of my daughter's life began when a judge, in sentencing, spoke of the great loss to the young man of the beautiful gun which had killed her. In that sentencing there was no mention of the loss to society of a beautiful and talented young woman who had and would have continued for several decades to contribute not only to the small community in which she lived and moved, but also to the community which is Montana, and to the larger community which is mankind.

Independent research and research by schools of medicine in the United States has proved that victims and victim survivors of terrible trauma are many times more likely to become critically ill or to die from accident or suicide in the period from eighteen months to three years following the occurrence. Part of this is the result of a system that works so slowly that it is impossible for one to concentrate his efforts on recovery. I did not find it surprising that the man who shot Shannon died either through suicide or accident sometime after filing suit against his own insurors for failing to defend and protect him. Neither did I find any satisfaction from his death. I grieved that the ongoing nightmare which began for me on June 26 of 1982 was now doubly visited on other parents.

Having worked in the insurance industry for a number of years, I am well aware that it is possible for a defendant to predict with relative accuracy how long a suit must be delayed to reach a "break-even" or profit status. It would be naive, at best, to believe that they do not use these same strategies for delay to force plaintiffs into untenable emotional and economic states.

For me, the knowledge that a giant corporation may, indeed, profit from the death of my daughter only deepens the psychological wounds I already carry. I find my own life devalued and degraded by a system which allows this to happen. Surely the rules of evidence, and the tax and interest structure as they relate to reserves are sufficient protection for defendants without also establishing upper limits on punitive or exemplary damages. There is no example for the involved defendant or for others who

SENATE JUDICIARY COMMITTEE
EXH'BIT NO. 20
DATE 031885
BILL NO. HB 363

may be using similar practices, unless the result is truly punitive in terms of cost. Would it not be just as reasonable, or more reasonable, then, to set a minimum on what must be awarded when a civil defendant is found guilty of negligent, unethical, or immoral behavior which damages others? Would not the civil justice system be better served and the needs of individual Montanans better served, if this committee and this general assembly were to find some way to make delay less profitable?

My personal anguish may not be appropriate to this testimony; but I must say how greatly it has been exacerbated by the passing two years ago of the date originally set for the trial in the civil action which I brought as a result of the killing of Shannon, and by the numerous continuances sought by and granted to the defendants since. I am devalued as a person, as a mother whose identity was lost in a shot from a high-powered rifle, and as a professional who must struggle to meet the demands of a part-time position. My fluency, my energy, my memory, my ability to concentrate have left me ... I struggle to find sufficient meaning in each day to sustain me. My own devaluation, however, is much less painful than the ongoing devaluation of Shannon which the process brings. She was an honor student, was fluent in three languages, had won several awards for creative writing, was a pianist and a liturgical dancer in the church, was on the board of the Women's Center at Montana State University. Her greatest love was the mountains, and she went to them both for the challenge and the peace they brought her. She was no stranger to these chambers, for she had come here as an intern while in high school and as an administrative assistant to the minority leader during her years at Rocky Mountain College. She was not just an observer, but was a commentator, critic, and participant of and in the life that flowed around her. Shannon was a protector and conservator of both the people and environment of her world. She died in terrible fear - she did not deserve that. Shannon died fifty years prematurely - she did not deserve that. She had not been warned that bear hunters were prowling in that public camping area at the height of the summer season. Life is not just; it is impossible to speak of justice and the irreversibility, the finality of unwanted and brutal death.

I am not alone. There are victims and victim survivors all over Montana, most of whom represent either the willful or the negligent acts of others. The presence of negligence implies the willingness to risk the well being of other individuals.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 20
DATE 031885
BILL NO HB 363

Late in 1984 I was contacted by the crime victims unit of the Division of Workers Compensation to ask that I volunteer as a resource to victim survivors because the need for aid and comfort for these people was still so great after the Division had done what it could to be of assistance. Since shortly after my daughter's death I have attempted to assist other parents who have lost children through homicide, willful or negligent; through driving while intoxicated, and through hit and run. Almost without exception they report that the system and its processes degrade them, devalue them, and at times inflict nearly as much pain as the original act.

To me it is of compelling importance that this legislature continue to let the jury system function as the arbiter of what is appropriate in the area of punitive and exemplary damages as an assurance to its constituency that the rights and needs of Montana citizens as individuals are more compelling than the rights of vested interest groups. House Bill 363 does not serve that purpose.

Thank you, Senator Mazurek, for allowing me to share my feelings with you.

Sincerely yours,

Frances Weatherly

Frances S. Weatherly

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 20
DATE 031885
BILL NO. HB 363

STATEMENT TO
THE SENATE OF THE
STATE OF MONTANA
AS TO
EXEMPLARY DAMAGES

Legislation to restrict punitive or exemplary damages to $500,000 is now before the Senate.

With new ideas, with new legislation we should always proceed cautiously and with a common-sense analysis.

Is there a need for a legislative change? Who will benefit and gain? Does the proposal serve a good purpose? We can all agree that a legislative change should and must be good for the people of the State of Montana.

A $500,000 limitation does not in any way improve or benefit the law system for the individual or the small corporation. $500,000 can represent the entire net worth of an individual or a small corporation. Consequently, it is of no benefit or gain to that type of defendant.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 21
DATE 031885
BILL NO. HB 363

For the large corporation, the very rich or the large insurance companies, such a limitation is virtual immunity against the theory of punitive damages which is a civil fine for fraud, oppression or malicious conduct. By way of example the net worth of the Atlantic Richfield Corporation in 1983 was in excess of 11 Billion, over 7 Billion for the Ford Motor Company and over 6 Billion for the State Farm Insurance Company.

$500,000 of the net worth of the least of these three corporationa (State Farm Insurance) is 120th of 1% of the net worth. And 1/2 is paid by the government because such damages are a business expense and a corporate deduction from the profit subject to tax.

Will that type and size of civil fine serve as an example to other large corporations and deter conduct which is fraudulent, oppressive or malicious? Of course not.

However, if $500,000 is assessed by a jury against an individual or a small corporation such a damage award will destroy - not punish.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 21
DATE 031885
BILL NO. HB 363

Exemplary or punitive damages are generally authorized by § 27-1-221 of the Montana Code. There is no limit anywhere in the Montana Codes. The limiting factor has been the jury and the Montana Courts. It has worked fairly and effectively. For how long? Since 1895 when the laws of Montana were first codified.

The juries and courts of Montana in those isolated instances where there are punitive damages have always determined that the defendant's net worth could absorb the amount assessed and continue to function with, hopefully, an elimination of the action or practices which justified the civil fine.

Who wants this proposed new litigation? For what reason? How will such a limitation benefit the people of the State of Montana?

If there is to be a limitation by law - a new concept and truly not needed, then there is a more just and fair way to accomplish the objective.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 21
DATE 031885
BILL NO. HB 363

Rather than have a $500,000 limitation which has no basis in logic or common-sense put the limitation on a percentage basis. 5% of net worth would be equal treatment for everyone - the individual, the small corporation and the big corporations who, of course, are the only legal entities which will benefit from the present proposed litigation.

Keep in mind, if the large corporate defendant has not been guilty of fraud, oppression or malice the juries and courts will not assess any damages. The best defense against punitive damages - far better than legislative restriction - is simple: treat people fairly and justly and honestly and you never need be concerned with punitive damages.

Finally, this is bad legislation. The people of Montana don't need it, the juries and the courts don't need it. Our system of law has its own internal mechanisims for restricting punitive damages to what is fair and just and economically within the ability of the defendant to pay.

A good rule to follow for everyone - an age-old concept of human wisdom.

"If it ain't broke, don't fix it."

SENATE JUDICIARY COMMITT
EXHIBIT NO. 21
DATE 031885
BILL NO. HB 363

Wade Dahood
3-1-85

MARCH 18 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 363

Third reading copy (Blue color)

LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS

Respectfully report as follows: That HOUSE Bill No. 363

Third reading copy
Be amended, as follows:

1. Page 2, line 2.
Following: "EVIDENCE."
Insert: "Clear and convincing evidence means evidence which is unmistakable and free from serious or substantial doubt.

(3) Presumed malice exists when a person has knowledge, which knowledge may be proven by direct or circumstantial evidence, of facts which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or in indifference to that risk

2. Page 2, line 3.
Strike: "(3)"
Insert: "(4)"

~~DO PASS~~

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 032285
BILL NO. HB 363

Chairman.

STATE PUB. CO.
Helena, Mont.

March 18, 1985 19

3. Page 2, line 9
Strike: "(4)"
Insert: "(5)"

4. Page 2, line 14
Strike: Lines 14 and 15 in their entirety.
Insert: "(6) (a) In cases of actual fraud, or actual malice, the jury may award reasonable punitive damages after considering the circumstances of the case.

(b) In all other cases where punitive damages are awarded punitive damages may be in an amount up to but no greater than $~~100~~,000 or 1% of the defendant's net worth whichever is greater.

(7) If a plaintiff sought exemplary damages at trial, but such damages were not awarded, the court shall submit to the jury a question concerning whether the jury found in the evidence presented any reasonable basis in fact for seeking exemplary damages. If the response to the question is negative, the court may, in its discretion as a penalty against such party, the party's attorney, or both, assess damages in an amount not to exceed what is determined by the court to be reasonable attorney fees and costs of the defendant incurred in defense of such claims.

(8) In cases where punitive damages may be awarded, the jury shall not be instructed, informed or advised in any manner as to the limitations on the amount of exemplary or punitive damages as set forth in section 6b."

And as concurred in
DO PASS

.....
Chairman

2. Page 2, line 21.
Following: "on"
Strike: "a"
Insert: "the attorney's"
Following: "fee"
Strike: remainder of line 21 through "fee" on line 22

The motion carried with Senator Daniels voting in opposition. Senator Daniels stated that is one of the things Judge Reardon was complaining about. He will spend as much time on that matter as on the claim. Mr. Grosfield stated the reference to settlement means nothing, because in order to get an award of attorneys' fees against the carrier, the case has to go to court and there must be litigation. The court has so ruled. Senator Towe asked if by taking it out you encourage the insurance company to say you are not entitled to attorneys' fees. Senator Mazurek responded they would then be liable to penalties.. Senator Brown moved HB 778 be recommended BE CONCURRED IN AS AMENDED. The motion failed with Senators Crippen, Daniels, Pinsoneault, Towe, and Yellowtail voting in opposition. Senator Pinsoneault moved HB 778 be recommended BE NOT CONCURRED IN AS AMENDED. The motion failed with Senators Blaylock, Brown, Galt, Mazurek, and Shaw voting in opposition. Senator Crippen moved HB 778 be TABLED. The motion carried with Senators Blaylock, Brown, Galt, and Mazurek voting in opposition.

FURTHER CONSIDERATION OF HB 363: Proposed amendments from Representative Bob Marks were distributed to the committee (Exhibit 1). Mr. Petesch explained the first amendment defines clear and convincing evidence. The second defines presumed malice in a manner similar to SB 200. The fourth amendment changes the amount which may be assessed. Senator Towe asked where they came up with the clear and convincing definition. Mr. Petesch stated he is not aware of any place that exists where clear and convincing evidence is defined, although there is a U.S. Supreme Court case that talks about clear and convincing evidence which is similar to this. Senator Towe pointed out the definition of presumed malice does not have the qualification "or reason to believe." Senator Pinsoneault stated defining clear and convincing raises an almost beyond-a-reasonable-doubt standard. He has no problem with that, but by defining clear and convincing is almost beyond a reasonable doubt. Bob James stated that definition is from a case in Michigan. Senator Towe moved HB 363 be amended as follows:

Page 1, line 10.
Following: line 9.
Insert: "NEW SECTION. Section 1. Purpose. The purpose of 27-1-221 is to deter claims for punitive or exemplary damages that are not clearly based in fact and, to that end, the

legislature intends for 27-1-221 to be used in combination with early and ready application and granting of motions for summary judgment pursuant to Rule 56 of the Montana Rules of Civil Procedure where such claims are not based in fact, and the application of the sanctions provided for in Rule 11 of the Montana Rules of Civil Procedure against those parties responsible for making such claims.

Renumber: subsequent sections

It does two things. First, you are trying to avoid going all the way through the trial. You can always apply for a summary judgment or a partial summary judgment. The judges generally are hesitant to grant summary judgments if there is any evidence. We say we want them to take a strong look at it and get it out of the trial. Second, the new Rule 11 applies and allows a judge to issue sanctions against an attorney who signs a pleading that has no basis. It does not accomplish a great deal, but it doesn't hurt anyone. The motion to amend carried unanimously. Senator Towe moved amendment No. 1 be adopted. He stated he is not sure you can justify that kind of a definition from any source, but it doesn't hurt. The motion to accept amendment No. 1 carried with Senators Blaylock, Daniels, and Mazurek voting in opposition. Senator Towe stated he doesn't like the proposed definition of presumed malice without the phrase "has reason to know." He stated he would like to go back to SB 200's definition of presumed malice. Senator Crippen stated he had no problem with the definition of actual malice. There is no cap, and that takes care of the Ford Pinto type case. But when you get into the area of reason to know, there will be a real question of what in the world is reason to know. Senator Mazurek stated you have unlimited punitive damages. He asked if that had an impact on this question. Senator Crippen moved as a substitute motion we adopt the proposed definition of presumed malice and amendments No. 2 and 3. Senator Towe stated he thinks it is unnecessary, and you still have the kinds of problems that come up in product liability cases where someone will say, if you don't tell me, I won't know. Senator Pinsoneault asked how they thought the jury would react if that ever came up in discovery. Senator Towe stated the judge would have to throw it out because it is not presumed malice. Senator Crippen stated that could be considered to be actual malice. Senator Towe moved as a substitute motion that the committee adopt the same definition of presumed malice as in SB 200 as that definition is right out of case law. The motion failed with Senators Brown, Crippen, Galt, Pinsoneault, and Shaw voting in opposition. Chairman Mazurek stated the committee would then revert to Senator Crippen's motion to adopt the proposed amendment titled subparagraph (3) relating to presumed malice. Senator Pinsoneault moved as a substitute motion that we simply eliminate the definition of presumed malice from the bill. Senator Mazurek asked why. Senator

Pinsoneault responded the supreme court has already defined presumed malice. Senator Crippen did not feel we should just sit back and let the supreme court legislate and tell us what we are going to do. Senator Pinsoneault withdrew his motion. The motion to adopt the amendment labeled subparagraph (3) carried with Senators Blaylock, Daniels, Towe, and Yellowtail voting in opposition. Senator Towe moved that amendment No. 4 entitled paragraph (6)(a) be adopted. Senator Mazurek explained that strikes the $500,000 limit. Senator Crippen moved as a substitute motion that proposed amendment No. 4, section (6)(a) and (b), be adopted. His reasoning was this is a case of compromise. The House wants a $500,000 cap. We are coming back and saying no, we don't want any limit on actual damages. At the same time, we need to discuss the subsection (b) where we are talking about the $100,000 and 1% cap. Senator Towe asked about striking the $100,000. Senator Mazurek stated that benefits little and hurts big. Senator Towe stated if you put in $100,000, that tends to be the pattern, and that is what everyone gets. He asked how you complied with subparagraph (8) if in fact you do not know what the net worth is. He asked who would make a determination of net worth in order to apply the limits. Senator Daniels suggested there would be a bifarcated hearing. Senator Crippen agreed to amend his motion by striking $100,000 and inserting $25,000. The motion carried with Senators Blaylock and Mazurek voting in opposition. Senator Crippen moved amendment No. 4, subparagraphs (7) and (8), be adopted. The motion carried with Senators Daniels and Mazurek voting in opposition. Senator Pinsoneault moved HB 363 be recommended BE CONCURRED IN AS AMENDED. The motion failed with Senators Blaylock, Daniels, Mazurek, Towe, and Yellowtail voting in opposition. Senator Towe explained the problem is the definition of presumed malice.

There being no further business to come before the committee, the meeting was adjourned at 8:00 a.m.

Committee Chairman

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date 03228

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

SENATE COMMITTEE JUDICIARY

Date 032285 House Bill No. 363 Time 8:52 am

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Bruce D. Crippen	X	
Senator Jack Galt	X	
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw	X	
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels		X
Chairman Senator Joe Mazurek	X	

(6) (4)

Cindy Staley
Secretary

Chairman

Motion: amendment - adopt (3)
presumed malice

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 03-22-85
BILL NO. H.B. 363

can't do it. Senator Towe explained you can do it, but not criminally. Senator Mazurek commented a bad check is a bad check. Senator Pinsoneault moved HB 622 be recommended BE CONCURRED IN. The motion carried with Senators Daniels, Towe, and Yellowtail voting in opposition.

ACTION ON HB 363: A proposed amendment was presented to the committee (Exhibit 5). Senator Crippen moved adoption of the amendment in substitution for the prior amendment No. 1 adopted for this bill yesterday. Senator Towe commented he had problems with "clear and convincing evidence." Steve Brown stated the language proposed was designed to deal with Senator Towe's concern that an executive in the Ford company says don't tell me about this defect because I don't want to know. He thinks that is actual malice. They are trying to deal with that because others do not agree. "Has reason to know" almost gets you back to a negligence standard. Karl Englund stated the whole notion for "reason to know" is to have both an objective and a subjective standard in this particular provision. That is the most difficult thing to prove. That is why that is an important factor in there. This amendment still deals with strictly the subjective things. What did he know? What did he intentionally avoid knowing or what did he intentionally disregard? It is different from a negligence theory. It is the difference between what he had reason to know and what he should have known. Senator Towe stated he thinks there is a point when you are trying to prove what is in somebody's mind that is a very subjective and difficult thing. What we are being asked to do is prove that, and he is a little nervous about that. He would go along with it if he knew that were in with the clear and convincing evidence which seems to have no precedent to it. Senator Yellowtail asked why the "high degree of risk." Mr. Petesch explained the high degree of risk of harm is in the standard definition. The motion to amend carried (see roll call vote attached as Exhibit 6). Senator Towe stated he had problems with "clear and convincing." He moved that the bill be amended by striking "is" and the balance of that sentence and inserting "will produce in the mind of the tryer of fact a firm believe or conviction as to the truth of the assertion sought to be established." He stated that is from civil cases. Senator Blaylock asked if we have been getting by without having defined it. Mr. Petesch responded the language "clear and convincing" does not appear in the statutes in Montana at this time. Senator Blaylock asked if we had been using the language at all. Senator Towe responded it is a common law concept. Mr. Petesch stated federal law does. Senator Blaylock asked if we had been using it in court cases. It is not in the statutes, but it is a common law term. Mr. Petesch responded the cases he is aware of are in federal areas where they provide a civil penalty similar to a criminal act. Senator Blaylock asked if it were defined. Mr. Petesch responded not that he is aware of. Senator Blaylock asked if we were getting by with it. Senator Crippen stated it is highly unlikely we

will have any insurance coverage to cover punitive damages in the state. The companies will exclude it. If the courts persist and go beyond, the companies will pull out of Montana. We are not looking at a big insurance company's standing behind that person; we are looking at the person. The Ford Motor Company is one thing, but they have a big, deep pocket. The majority of the people in the state don't have a big, deep pocket. The trend is we are suing everybody and throwing in punitive damages. He is in favor of them in the right circumstances. Intent to harm and actual malice is where it should be. When we are starting to presume, that should be a tough test. Senator Towe moved as a substitute motion that the amendments be amended by stating "Clear and convincing means evidence in which there is no serious or substantial doubt . . . ." Senator Mazurek stated whatever we say, a court will determine what we mean. It is less than beyond a reasonable doubt or we would have said that. He suggested we let the court decide. Mr. Petesch commented the courts have interpreted it as a middle standard. Senator Pinsoneault suggested dropping it. Senator Mazurek read language from Iowa. Senator Pinsoneault moved as a substitute motion that that language be adopted. The motion carried unanimously. Mr. Petesch stated there is a technical changed needed on the statement of purpose adopted yesterday and the codification instruction for that section. Senator Towe moved the staff attorney be instructed to make the appropriate technical changes mentioned. The motion carried with Senator Daniels voting in opposition. Senator Towe moved that we insert the same applicability date in this bill as in SB 200. Mr. Petesch stated it affects removing from the effective date claims arising before the effective date which is immediate. Senator Towe moved an immediate effective date and applying to claims arising only after the effective date. Senator Crippen stated he can see where you shouldn't affect any trial in effect, but how do you know what torts are affected? We are not affecting their ability to pursue the case, we are affecting what they can get. The motion carried unanimously. Senator Crippen moved HB 363 be recommended BE CONCURRED IN AS AMENDED. The motion carried with Senators Daniels and Yellowtail voting in opposition.

ACTION ON HB 594: Senator Yellowtail moved HB 594 be recommended BE CONCURRED IN. The motion carried unanimously.

There being no further business to come before the committee, the meeting was adjourned at 2:18 p.m.

Committee Chairman

STANDING COMMITTEE REPORT

March 23 19 35

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration HOUSE BILL No. 363

third reading copy (blue color)

(Senator Towe)

LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS

Respectfully report as follows: That HOUSE BILL No. 363

be amended as follows:

1. Page 1, line 10.
Following: line 9
Insert: "NEW SECTION. Section 1. Purpose. The purpose of 27-1-221 is to deter claims for punitive or exemplary damages that are not clearly based in fact and, to that end, the legislature intends for 27-1-221 to be used in combination with early and ready application and granting of motions for summary judgment pursuant to Rule 56 of the Montana Rules of Civil Procedure where such claims are not based in fact, and the application of the sanctions provided for in Rule 11 of the Montana Rules of Civil Procedure against those parties responsible for making such claims."
Renumber: subsequent sections

~~XXXXXX~~

~~XXXXXXXXX~~

CONTINUED

Chairman.

HOUSE BILL NO. 363

2. Page 2, line 2.
Following: "EVIDENCE."
Insert: "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence, but less than beyond a reasonable doubt.

(5) Presumed malice exists when a person has knowledge of facts, intentionally avoids learning of facts, or recklessly disregards facts, knowledge of which may be proven by direct or circumstantial evidence, which creates a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk or recklessly proceeds in unreasonable disregard of or indifference to that risk."
Renumber: subsequent subsections

3. Page 2, lines 14 and 15.
Strike: lines 14 and 15 in their entirety
Insert: "(6) (a) In cases of actual fraud or actual malice, the jury may award reasonable punitive damages after considering the circumstances of the case.

(b) In all other cases where punitive damages are awarded, punitive damages may be in an amount up to but no greater than $25,000 or 1% of the defendant's net worth, whichever is greater.

(7) If a plaintiff sought exemplary damages at trial, but such damages were not awarded, the court shall submit to the jury a question concerning whether the jury found in the evidence presented any reasonable basis in fact for seeking exemplary damages. If the response to the question is negative, the court may, in its discretion as a penalty against such party, the party's attorney, or both, assess damages in an amount not to exceed what is determined by the court to be reasonable attorney fees and costs of the defendant incurred in defense of such claims.

(8) In cases where punitive damages may be awarded, the jury shall not be instructed, informed, or advised in any manner as to the limitations on the amount of exemplary or punitive damages as set forth in section (6)(b)."

CONTINUED

March 23 19 85

HOUSE BILL NO. 363

4. Page 3, line 15.
Following: "any"
Strike: "proceeding begun"
Insert: "claim arising"
Following: "after"
Strike: "or pending on"

5. Page 3, lines 16 and 17.
Following: "act" on line 16
Strike: remainder of line 16 through "act" on line 17

6. Page 3, line 18.
Following: line 17
Insert: "Section 5. Codification instruction. Section 1 is intended to be codified as an integral part of Title 27, chapter 1, part 2, and the provisions of Title 27, chapter 1, part 2, apply to section 1."
Renumber: subsequent section

AND AS AMENDED

BE CONCURRED IN

Senator Joe Mazurek, Chairman

SENATE STANDING COMMITTEE REPORT

March 23, 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration HOUSE BILL No. 363

third reading copy (blue color)

(Senator Towe)

LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS

Respectfully report as follows: That HOUSE BILL No. 363

be amended as follows:

1. Page 1, line 10.
Following: line 9
Insert: "NEW SECTION. Section 1. Purpose. The purpose of 27-1-221 is to deter claims for punitive or exemplary damages that are not clearly based in fact and, to that end, the legislature intends for 27-1-221 to be used in combination with early and ready application and granting of motions for summary judgment pursuant to Rule 56 of the Montana Rules of Civil Procedure where such claims are not based in fact, and the application of the sanctions provided for in Rule 11 of the Montana Rules of Civil Procedure against those parties responsible for making such claims."
Renumber: subsequent sections

XXXXXXXX

XXXXXXXXX

CONTINUED

Chairman.

HOUSE BILL NO. 363

2. Page 2, line 2.
Following: "EVIDENCE."
Insert: "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence, but less than beyond a reasonable doubt.

(3) Presumed malice exists when a person has knowledge of facts, intentionally avoids learning of facts, or recklessly disregards facts, knowledge of which may be proven by direct or circumstantial evidence, which creates a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk or recklessly proceeds in unreasonable disregard of or indifference to that risk."
Renumber: subsequent subsections

3. Page 2, lines 14 and 15.
Strike: lines 14 and 15 in their entirety
Insert: "(6) (a) In cases of actual fraud or actual malice, the jury may award reasonable punitive damages after considering the circumstances of the case.

(b) In all other cases where punitive damages are awarded, punitive damages may be in an amount up to but no greater than $25,000 or 1% of the defendant's net worth, whichever is greater.

(7) If a plaintiff sought exemplary damages at trial, but such damages were not awarded, the court shall submit to the jury a question concerning whether the jury found in the evidence presented any reasonable basis in fact for seeking exemplary damages. If the response to the question is negative, the court may, in its discretion as a penalty against such party, the party's attorney, or both, assess damages in an amount not to exceed what is determined by the court to be reasonable attorney fees and costs of the defendant incurred in defense of such claims.

(8) In cases where punitive damages may be awarded, the jury shall not be instructed, informed, or advised in any manner as to the limitations on the amount of exemplary or punitive damages as set forth in section (6)(b)."

CONTINUED

March 23 19 85

HOUSE BILL NO. 363

4. Page 3, line 15.
Following: "any"
Strike: "proceeding begun"
Insert: "claim arising"
Following: "after"
Strike: "or pending on"

5. Page 5, lines 16 and 17.
Following: "act" on line 16
Strike: remainder of line 16 through "act" on line 17

6. Page 3, line 18.
Following: line 17
Insert: "Section 5. Codification instruction. Section 1 is intended to be codified as an integral part of Title 27, chapter 1, part 2, and the provisions of Title 27, chapter 1, part 2, apply to section 1."
Renumber: subsequent section

AND AS AMENDED

BE CONCURRED IN

Senator Joe Mazurek, Chairman

COMMITTEE OF THE WHOLE AMENDMENT

SENATE

Mar 28, 1985
DATE

1:25
TIME

MR. CHAIRMAN: I MOVE TO AMEND SENATE JUDICIARY COMMITTEE REPORT OF MARCH 23,1985, ON HOUSE BILL No. 363

_____) as follows:

Amendment No. 3.
Strike: subsection (7) of inserted material in its entirety

Renumber: subsequent subsection

PC3HB363.671

ADOPT

REJECT

Mike Hallman